IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,

Appellants,

v.

DONALD BRADY, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

FRANCIS B. BURCH,
Attorney General of Maryland
GEORGE A. Nilson,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Attorneys for Appellants.

The Daily Record Co., Baltimore, Md. 21202

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes Involved

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. _____

WILLIAM SWISHER, ET AL.,

Appellants,

v.

DONALD BRADY, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

Appellants, William Swisher et al., respectfully pray for either plenary consideration of the questions presented, with briefs on the merits and oral argument, or for summary reversal should the Court conclude that the decision below is clearly in error.

OPINION BELOW

The District Court issued its opinion on September 16, 1977. The opinion has not yet been reported but is reprinted at pages 1a to 18a.

JURISDICTION

On November 25, 1974, Appellees filed suit in the United States District Court for the District of Maryland alleging deprivation of their constitutional rights in violation of the Double Jeopardy Clause of the Fifth

Amendment of the U.S. Constitution as applied to the States through the Fourteenth Amendment. Jurisdiction was alleged under 42 U.S.C. Section 1983. Because an injunction was sought against the operation of portions of Maryland statutes and rules application was made for the convening of three judge district court under 28 U.S.C. Section 2284. On June 2, 1976, argument was heard. Following motions to dismiss supplemental complaints filed by the Appellant, the Appellants' motion was denied after a hearing. The Court filed its opinion on September 16, 1977, and on September 19, issued its final order granting Appellee's declaratory and injunctive relief (See Appendix pp. 1a-18a). Notice of appeal to this Court was filed on October 14, 1974, in the District Court of Maryland. (See Appendix pp. 18a-19a). Jurisdiction is conferred on this Court by 28 U.S.C. Section 1253.

STATUTES INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution is involved. Also involved is the Maryland Juvenile Causes Statute concerning masters in the Juvenile Court; Courts and Judicial Proceedings Article, Section 3-813 and Maryland rules 910 and 911 implementing that statute. These statutory provisions are reprinted at pp. 20a-24a of the Appendix.

QUESTION PRESENTED

Whether the District Court erred in determining that the Appellants are barred by the double jeopardy clause of the Fifth Amendment from taking exceptions to findings and recommendations of a juvenile master in order to obtain a further review on the record by the juvenile judge?

STATEMENT OF THE CASE

For the purposes of this jurisdictional statement the facts relevant to this issue at this stage of the proceedings were concisely summarized by the District Court as follows:

> "A case (in Juvenile Court) is generally instituted when the Office of the State's Attorney files a petition which alleges that the 'Named Child under the age of eighteen years is Delinquent.' If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing[1] is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an exception. Others do not so inform the juvenile. Under Rule 910 the Master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.
>
> Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the

[1] The Appellants except to the use of the word "Adjudicatory" as will be more clearly shown in the argument *infra*.

charge was not sustained and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

THE DISTRICT COURT ERRED IN DETERMINING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO THE STATE'S THROUGH THE FOURTEENTH AMENDMENT BARS THE APPELLANTS FROM TAKING EXCEPTION TO THE FINDINGS AND RECOMMENDATIONS OF THE JUVENILE MASTER IN ORDER TO OBTAIN A FURTHER REVIEW ON THE RECORD BY THE JUVENILE JUDGE.

Since *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056 (1969) the double jeopardy clause of the Fifth Amendment to the Constitution of the United States has been incorporated into the due process clause of the Fourteenth Amendment and is applicable to the States. A number of cases before and since that holding have had occasion to discuss what in the view of the Supreme Court is the exact nature of the protection afforded by the Fifth Amendment. It has recently been held in *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779 (1975) that jeopardy denotes risk and that jeopardy attaches when an individual is put to trial before the trier of facts and further that the double jeopardy clause is written in terms of potential risk of *trial* and conviction, not punishment. *Breed, supra,* 95 S. Ct. at 1787. However, where an individual has not been put to trial before the trier of fact, jeopardy does not attach even though the District Court exercising judicial power and jurisdiction grants a Motion to Dismiss, *Serfass v. U.S.,* 420 U.S. 377, 95 S. Ct. 1055 (1975). Furthermore it

was conceded in *U.S. v. Kysar,* 459 F.2d 422 (10th Cir. 1972) that the double jeopardy clause did not apply to an indictment returned by a Federal Grand Jury after a U.S. Commissioner had dismissed the initial complaint on grounds that the Government had failed to show that a crime had been committed. Lastly it has, of course, been determined that the double jeopardy clause applies to juvenile proceedings, *Breed v. Jones, supra.*

Thus assuming, as we must, that the double jeopardy provisions of the Constitution attach to juvenile delinquency proceedings, a preliminary question must be answered, that is when does jeopardy attach under Rule 910 of the Maryland Rules of Procedure.

The Court of Appeals of Maryland in *Matter of Anderson,* 272 Md. 85 (1974) concluded that in order for jeopardy to attach it must be a proceeding in a court having jurisdiction over both the accused and the offense, *Anderson, supra,* at page 98. The Court also found that under Maryland law an order is not final if further action of the court is required beyond the supervision of the carrying out of the decree, page 100. In line with this, the Court ruled that a master cannot make an adjudication, page 102-103, and that under the provisions of Maryland Constitution, Article IV, Section 1, the judicial power of the State of Maryland is vested in, among other courts, the Circuit Courts and that masters are not judges and, therefore, are not vested with any part of the judicial power of the state, page 105. As an example of this, Judge Smith speaking for the Court of Appeals in *Anderson* cited *Mississippi v. Arkansas,* 415 U.S. 289, 94 S. Ct. 1046 (1974) as an example of when the Supreme Court of the United States itself used a master. Judge Smith pointed out that surely the Supreme Court did not consider itself to be bound by the recommendations and findings of the special master appointed in that case. Nonetheless the Supreme Court itself did not hold any adjudicatory

hearings itself. It is to be remembered that in original actions between states the Supreme Court has original jurisdiction. Accordingly there was no lower tribunal which sat as trier of fact. Thus the only facts before the Supreme Court were those either stipulated to by the parties or found and reported by the special master in the case. The Supreme Court affirmed the master's findings, overruled Arkansas' exceptions to the master's report, confirmed that report, and accepted the master's recommendation for a decree. *Mississippi v. Arkansas, supra,* 94 S. Ct. at 1048. The court then concluded that upon the independent review of the record, the report filed by the master, the exceptions thereto, and the argument thereon the decree would be entered. *Mississippi v. Arkansas, supra,* 94 S. Ct. at 1049. Obviously no one is suggesting, least of all the Supreme Court, that the special master in the instant case was vested with the judicial power of the Supreme Court of the United States, yet he heard facts and assessed the credibility of witnesses. *Mississippi v. Arkansas,* 94 S. Ct. at 1048. Clearly the master was not exercising any judicial power since, of course, he is barred from exercising any judicial power under the provisions of Article 3, Section 1 of the United States Constitution. In *Muskrat v. U.S.,* 219 U.S. 346, 31 S. Ct. 250 (1911) the Supreme Court speaking through Mr. Justice Day stated at page 356:

> "'Judicial power' says Mr. Justice Miller, in his work on the Constitution 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision' Miller, Constitution 314."

Clearly then the Supreme Court is sanctioning the use of masters by federal courts to accept referral of cases from the District Courts for the purposes of finding facts and making recommendations to the

District Court. It is true that such orders of reference are for the moment limited to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure but the language of the Supreme Court in both the majority and dissenting opinions in *Wingo v. Wedding,* 418 U.S. 461, S. Ct. 2842 (1974) clearly indicates that it is merely the statutory and rule proscriptions which prevent further use of masters, including the fact finding hearing under a habeas corpus application. For other cases in which masters were employed see *Oteri v. Calzo,* 145 U.S. 478, 12 S. Ct. 895 (1892); *In Re Peterson,* 253 U.S. 300, 40 S. Ct. 543 (1920); *Phelan v. Middlestate Oil Corporation,* 156 F.2d 697 (2d Cir. 1946); and *United States v. Twin City Power Company,* 248 F.2d 108 (4th Cir. 1957). Despite the fact that a magistrate or a master cannot exercise the ultimate decision making power in a federal court under an order of reference, *T.P.O., Incorporated v. McMillen,* 450 F.2d 348, (7th Cir. 1972); *Campbell v. United States District Court for the Northern District of California,* 501 F.2d 196 (9th Cir., 1974) the federal courts nonetheless:

> ". . . (M)ust give great deference to the judgment of the Master in such cases as this which turn in large part upon the credibility of witnesses and on involved questions of accountancy." *Carter Products, Inc., v. Colgate-Palmolive Company,* 214 F. Supp. 383 (D.C. Md. 1963). Opinion by then Chief Judge Roszel C. Thomsen.

Most relevant to the case before the court is, of course, the recent decision in *Aldridge v. Dean,* 395 F. Supp. 1161 (D.C. Md., 1975) in which Judge Thomsen of this court granted habeas corpus relief to nine petitioners, who are the Appellees in the instant case. The rule in the *Aldridge* case is predicated upon the former provisions of Chapter 900 of the Maryland Rules of Procedure and the former provisions of subtitle 3 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland. Judge Thomsen in his ruling made

certain findings of fact on the record presented to him. In his summation of the chronology of the case he also took note of the fact that the Court of Appeals of Maryland in *Matter of Anderson,* 272 Md. 85 (1974) specifically stated that the master has no authority to exercise judicial power and that the master's findings do not become binding until approved by a judge of the court to which he reports, *Aldridge, supra,* 1168. As a result of his findings under former Chapter 900 Maryland Rules of Procedure, the District Court apparently found three conclusions, (1) that a juvenile is placed in jeopardy when the State begins to offer evidence in an adjudicatory hearing before a master, (2) that whether it be double jeopardy or fundamental fairness once a master has announced a finding of charges not sustained, the State is not permitted to file an exception and obtain a *de novo* adjudicatory hearing, and (3) that the Fourteenth Amendment was violated when, after the master announced his findings, the State filed exceptions and the Petitioners were "put to the task of marshalling (their) resources against those of the State" which resulted in their "twice (being) subjected to the 'heavy personal strain' which such an experience represents." (Citations omitted) *Aldridge, supra,* 1173. It is interesting to note that Judge Thomsen in his opinion stated that aside from the question of the *de novo* hearing provision, the evidence before him indicated that the practice under the Maryland Statute and Rule would nonetheless have been held proper:

> ". . . if the cases are adequately prepared and presented by the State's Attorney, if the record of the proceedings at all adjudicatory hearings is made, if an adequate report is prepared by the master in each case, if an adequate number of judges (whether one or more than one) is available to review the master's report and recommendations,

> and the judge devotes the necessary time to such review and consults with the master when he sees a problem or has any doubt to the proper order. This is shown by the practice in Howard County, as testified to by Judge James MacGill, the Chief Judge and Administrative Judge of the Fifth Judicial Circuit." *Aldridge, supra,* 1173.

Clearly, Judge Thomsen was indicating his belief that even while he was granting habeas corpus relief in *Aldridge* he nonetheless felt that the Maryland rule then extant could be made to work if properly implemented. It is thus submitted that it is not the statute and rule which was unconstitutional in Judge Thomsen's view but rather the procedure thereunder. Accordingly *Aldridge v. Dean* itself is not authority to find the rule and statute in question unconstitutional. To the contrary it would seem that Judge Thomsen's remarks clearly indicate his belief to the contrary upon proper circumstances.

Subsequent to *Aldridge* it is worthy of specific note that the rule as amended permits the State, as before, to take exceptions if a finding of non-delinquency is proposed by a master pursuant to Rule 911 but the State may not have a hearing *de novo* but merely a review on the record. Furthermore the State may only supplement the record by such evidence as the Court considers relevant *and to which the parties raise no objection.* This language is carried over into paragraph C of Rule 911 which permits the trial court to adopt the master's proposed findings of fact, conclusions of law and recommendations or to order a further hearing on the record supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Obviously the rule as now extant does not require the juvenile to undergo a *de novo* hearing unless he himself wishes it. Furthermore it does not allow the juvenile court to consider any further evidence other

than what was presented to the master unless the juvenile requests it or permits it. Still further the provisions of the rule clearly indicate that when reviewing the record the trial court shall have before him the entire file in the case, a written statement of the master's proposed findings of fact, conclusions of law, recommendations and a proposed order. So to Rule 910(a) specifically mandates that all hearings before a master or the court shall be recorded by either stenographic notes or by electronic, mechanical or other appropriate means. Clearly then the trial court also has for its review and perusal the exact transcripts of testimony before the master either in electronic or written form. The juvenile court is than able, from this information presented to him, to make a determination if he wishes as to the merits of the case. He is permitted to require additional evidence if he deems it necessary, if the juvenile does not object, and his adoption of the proposals and recommendations of the master *may* be adopted by the court but under Rule 911(d) those proposals and recommendations are not final action of the court and the discretion is wholly vested in the trial court.

Thus it can be seen that much the same as the federal court system employs the use of masters to gather and present evidence and recommendations to federal tribunals without delegating judicial power thereto, so Maryland does with regard to its juvenile masters under Chapter 900 of the Rules of Procedure, without delegating to them judicial authority. There is no substantial risk of second prosecutions and second fact finding procedures and contrary adjudication, but rather one specific continuing delineated procedure utilizing the master merely as an advisor to the court. There is no improper delegation of power, there is no judicial authority vested in the master and his findings of fact and conclusions of law are not binding on the trial court even if they are stipulated to.

If this Honorable Court finds contrary to the Court of Appeals of Maryland in *Matter of Anderson, supra,* that jeopardy attaches when the master begins the adjudicatory hearing, then it is submitted that jeopardy does not terminate with the submission of the proposed findings and recommendations but rather continues until the trial court is able to make an adjudication. Although the Supreme Court has not expressly adopted a continuing jeopardy doctrine as proposed by Mr. Justice Holmes in his dissent in *Kepner v. U.S.,* 195 U.S. 100, 24 S. Ct. 797 (1904), other courts including the Supreme Court have *implicitly* recognized a continuing jeopardy doctrine envisioned by Mr. Justice Holmes under circumstances where a criminal defendant appeals a verdict of guilty, gains a reversal and is subjected to a retrial on the same charges. See *Price v. Georgia,* 3938 U.S. 323, 90 S. Ct. 1767 (1970); *Ball v. U.S.,* 163 U.S. 662, 16 S. Ct. 1192 (1896); see also *Jones v. Breed,* 497 F.2d 1160, 1167 (9th Cir. 1974). Clearly the nature of the proceeding obviously indicates that the final determination of the case on the merits is not made until the trial court reviews all the evidence, objections and arguments of law appertaining thereto. And the master is not clothed with even a vestige of judicial power under Chapter 900 of the Maryland Rules of Procedure. Accordingly, if this court rules that the master's determination is a final determination for the purposes of concluding the existence of jeopardy, this court will be granting to the master jurisdiction which he does not possess and which he cannot exercise.

The double jeopardy clause of the Fifth Amendment to the United States Constitution as applicable to the states through the Fourteenth Amendment and the due process clause therein is not offended by Chapter 900 of the Maryland Rules of Procedure or subtitle 3 of the Courts and Judicial Proceedings Article, Annotated Code of Maryland.

In the instant case the District Court placed heavy reliance upon *Breed v. Jones, supra,* in determining that the double jeopardy clause was violated when the State took exceptions to the masters' ruling. However, the factual posture in *Breed* is totally different from the present case. While the Appellant readily acknowledges the general principle that the double jeopardy clause applies to juvenile proceedings it does not believe that that principle has been violated in the instant case. In *Breed* the juvenile was charged by petition in the juvenile court with armed robbery. The juvenile court held a "jurisdictional or adjudicatory hearing" during which witnesses for the State and the respondent testified. At the conclusion thereof the Court declared the respondent "unfit for treatment as a juvenile" and ordered that he be prosecuted as an adult. Thereafter, the juvenile was charged in the Superior Court via a criminal information and was eventually convicted. However, in the instant case juvenile proceedings commence in a juvenile court and terminate there. Unlike *Breed* the case is not transferred from the juvenile court to the adult criminal court. The fundamental and crucial distinction between *Breed* and the present case is that the master makes no adjudication. He merely submits his proposed findings and recommendations to the juvenile court judge. If the State wishes to except to those findings and recommendations it may do so but the hearing on those exceptions is on the record of the proceedings before the master unless the juvenile agrees otherwise. Appellant submits that this hearing before the juvenile judge does not therefore constitute a new "risk" and the juvenile is not "put to trial before a trier of the facts" *Breed v. Jones, supra.* The Appellant's position is buttressed by decisions in California and Colorado where officials known as referees perform the functions of the juvenile

master in Maryland. *Bradley v. People,* 65 Calif. Rptr. 570 (1968), *In Re Henley,* 88 Calif. Rptr. 458 (1970), *Jesse W. v. Superior Court of Mateo County,* 133 Calif. Rptr. 870 (1976); *People v. J.A.M.,* 174 Colo. 245 (1971).

CONCLUSION

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal and that the questions presented are substantial. It is respectfully requested that this Honorable Court direct full consideration of the questions presented, with briefing and oral argument. Should the Court conclude that the Lower court decision was clearly in error then it should be summarily reversed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland
GEORGE A. Nilson,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Attorneys for Appellants.

APPENDIX

In The
United States District Court
For The District of Maryland

Donald Brady, et al.,
v.
William Swisher, et al.,

Civil No. Y-74-1291

MEMORANDUM AND ORDER

DATE: 9/16/77

PETER S. SMITH, Esq., Attorney for Plaintiffs, Baltimore, Maryland.

BERNARD RAUM, Esq., Assistant Attorney General, Attorney for Defendants, Baltimore, Maryland.

On November 25, 1974 plaintiffs[1] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton,

[1] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory and injunctive relief, and to enjoin the defendants from subjecting plaintiffs to a second trial or disposition pursuant to Rule 908e 2 and 3, Md. Rules of Procedure, which plaintiffs allege violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. This action is brought pursuant to 42 U.S.C. § 1983 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C. § 2284, plaintiffs filed a request for certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact have been met and that the plaintiffs can adequately represent the interests of the class and are represented by competent counsel, that request is granted. Rule 23(a) (1) F.R.Civ.P. The class is designated as a (b)(2) class under Rule 23 F.R.Civ.P. and consists of all juveniles against whom, on or after June 12, 1976, the State of Maryland had filed exceptions to the finding of non-delinquency. This Court has previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The defendants have moved for relief from this order since the exceptions filed by the State's Attorney's Office were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney has also withdrawn its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before this three-judge panel (June 12, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception. The motion of Eugene Fields to intervene as a plaintiff will be granted. The motion of Meadows to intervene is denied

and the defendants are granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

Pending determination of nine habeas corpus petitions, filed by the original plaintiffs here, the three-judge court stayed consideration of this case. On June 12, 1975 Judge Thomsen granted habeas corpus relief to six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. *See, Aldridge v. Dean,* 395 F. Supp. 1161 (D. Md. 1975).

On July 17, 1975 the defendants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the Maryland legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813, and the Maryland Court of Appeals amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975, as well as the opinion of this Court in *Aldridge v. Dean, supra.* Former Rule 908e 2 and 3 no longer exists, but has been amended and reenacted as Rule 910e, Md. Rules of Procedure. The plaintiffs were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code Cts. & Jud. Proc. Art., § 3-813 and Rule 910e, Md. Rules of Procedure, violate the Double Jeopardy Clause of the Fifth Amendment, and an injunction enjoining the defendants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[2] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813 and Rule 910e. The defendants' motion to dismiss this supplemental complaint was denied after a hearing on the motion.

[2] This Court has granted plaintiffs' motion to substitute Swisher for Allen and Gault-then Mazelis-for Daly. In his complaint, Fields only seeks relief from Swisher, Gault and Daly.

The defendants reasserted their argument that this case should be dismissed on the ground of mootness. However, the intervention of Eugene Fields saves this case from becoming moot. At oral argument it was agreed that the State has filed an exception to the master's findings and recommendations and that a hearing has been set before the juvenile judge on the exception. Thus an actual case and controversy exists between the plaintiff, Eugene Fields, and the defendants.

An evidentiary hearing was conducted in the nine habeas corpus cases (*Aldridge, supra*) at which counsel stipulated that the evidence admitted there would be admissible in this proceeding subject to any objections. This Court conducted a brief evidentiary hearing and counsel have submitted several stipulations and additional documentation. Most of this new evidence brings up to date the statistics introduced in the Aldridge hearing.

A case is generally instituted when the Office of the State's Attorney files a petition which alleges that the "Named child under the age of eighteen years is Delinquent." If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, rape or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an

exception. Others do not so inform the juvenile. Under Rule 910 the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the charge was not sustained and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master.

The legal issue, and only issue, presented in this case is whether the defendants are barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, *see Benton v. Maryland,* 395 U.S. 784 (1969), from taking exceptions to findings and recommendations of a master pursuant to Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813, and Rule 910e, Md. Rules of Procedure, in order to obtain a different resolution by the juvenile judge.

Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813 provides:

> (a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his

appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.

(b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing *de novo* or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

(d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a *de novo* hearing. However, if all parties and the court agree, the hearing may be on the record.

Rule 910e provides:

> Upon the filing of exceptions, the judge shall instruct the clerk to schedule a hearing on the exceptions. A party who files exceptions, other than the State, may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Either hearing shall be limited to those[3] matters to which exceptions have been taken.

Clearly these two provisions conflict. The statute permits a *de novo* hearing if the party taking an exception requests one or if the court, on its own motion, decides not to adopt the master's findings. However, the rule provides that a hearing on exceptions filed by the State must be on the record and not *de novo* unless the juvenile raises no objection. Under Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule-making power of the Maryland Court of Appeals. *See County Fed. S. & L. v. Equitable Sav. & Loan,* 261 Md. 246, 253 (1971). Here both the statute and the rule became effective on July 1, 1975; however, the rule was approved and adopted by the Court of Appeals after the statute was signed into law. At oral argument counsel agreed that the rule controls. Thus this Court need only discuss the provisions of the rule.

Resolution of the legal issue must consider two questions: (1) Whether the adjudicatory hearing before

---

[3] Rule 910e was amended, effective January 1, 1977, and the clauses at issue in this case are now incorporated, without substantive changes, in Rule 911c Md. Rules of Procedure, paragraph 2:

> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing de novo or a hearing on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

Reference to the section is made in the remainder of the body of this opinion as Rule 910e [Rule 911c].

the master is a jeopardizing proceeding and (2) If so, whether the proceeding bars any further adjudication by the judge of the Juvenile Court. *See Breed v. Jones,* 421 U.S. 519 (1975); Whitebread & Batey, *Juvenile Double Jeopardy,* 63 Geo. L.J. 857 (1975).

The decisions of the Supreme Court in *Breed* and of Judge Thomsen in *Aldridge* clearly establish that jeopardy attached when the State begins to offer evidence in an adjudicatory hearing before a master. In *Breed* the Court stated:

> We believe it simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years * * *.
>
> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel Marius v. Hess,* [317 U.S. 537] at 548-549. Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens — psychological, physical, and financial — on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense." [Citation omitted.] * * *
>
> Thus in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.'" [Citation omitted.]
>
> * * * We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to

> trial before the trier of facts," [Citation omitted], that is, when the Juvenile Court, as the trier of the facts, began to hear evidence.

Breed v. Jones, 521 U.S. at 529-531. Judge Thomsen, quoting this same language, concluded in *Aldridge* at 1172 "A juvenile is placed in jeopardy when the state begins to offer evidence in an adjudicatory hearing before a master." A similar conclusion was reached in *Brenson v. Havener,* 403 F. Supp. 221 (N.D. Ohio 1975).

Despite these decisions, the defendants, relying on *Matter of Anderson,* 272 Md. 85 (1974), argue that jeopardy does not attach when the State begins to offer evidence in an adjudicatory hearing before a master, but only when the master transmits his recommended findings to the juvenile judge. The Court of Appeals of Maryland in *Matter of Anderson, supra,* stated that the role of a master is only advisory and that a master has no judicial power. Defendants argue that since a master cannot enter a final order in the case, a juvenile is not placed in jeopardy when he appears before the master, thus distinguishing *Breed* where the juvenile originally appeared before a juvenile judge who had the power to enter a final order, if he so chose. The defendants in adopting this argument overlook the clear language in both *Breed* and *Aldridge.* Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and insecurity" in a juvenile and imposes a "heavy personal strain," and the juvenile is put to the task of marshaling his resources against those of the State." *Aldridge* at 1173. The changes in the proceedings before a master, caused by the adoption of Rule 910, [Rule 911] do not alter the conclusion that jeopardy attaches when the State begins to offer evidence before a master in an adjudicatory hearing. That hearing is similar to a court trial in a criminal case. The State first presents its case by calling witnesses who are sworn and subject to cross-examination by the juvenile's counsel. If the juvenile's motion for a directed verdict is denied, then he may put on his case. Clearly jeopardy attaches at such a

proceeding when the State begins to offer evidence before the master, the trier of facts.

Having determined that jeopardy attaches when the master begins to hear evidence, it must next be determined if a juvenile is placed twice in jeopardy when the defendants here take an exception to the findings of a master pursuant to Rule 910e [Rule 911c] In analyzing the constitutionality of the procedures permitted by Rule 910e [Rule 911c], two issues must be considered: (1) Whether "continuing jeopardy" applies to this situation and (2) Whether the rehearing on the record before the juvenile judge is justified by interests of society, reflected in the juvenile court system, or by interests of the juveniles themselves. *See Breed v. Jones, supra*, at 534-535.

Besides the courts in *Aldridge, Brenson* and *Matter of Anderson,* two state courts have faced the application of the Double Jeopardy Clause to review by a juvenile court judge of a master's findings. In *Bradley v. People,* 65 Cal. Rptr. 570 (Ct. App. 1968), the California Court of Appeals, stressing the "conditional nature of a referee's order," found nothing in the applicable provisions of the Juvenile Court Law, permitting a *de novo* review of a referee's order, which offended the Fifth and Fourteenth Amendments. *Bradley* at 575. Later, in following this holding in another case, the California Court of Appeals stressed that in *Bradley* "the determinative factor . . . was the limited nature of the powers of a referee." *In Re Henley,* 88 Cal. Rptr. 458, 561 (Ct. App. 1970).

In *People v. J.A.M.,* 174 Col. 245 (1971) (en banc), the Colorado Supreme Court held that a second hearing before the juvenile judge, following a referee's finding that the evidence was not sufficient to sustain the petition in delinquency, did not place the juvenile twice in jeopardy. The court stated:

> Under the provisions [of the statute], the findings and the recommendations of the referee *do not* have the effect of a final judgment until adopted or modified by the court.

> We are not here dealing with two separate proceedings, one before the referee and a second before the court, but rather with one proceeding to pass on the question of possible delinquency.

People v. J.A.M., supra, at 248-249.

Both cases were decided before the Supreme Court considered *Breed v. Jones* and contain language indicating that the Double Jeopardy Clause did not apply to juvenile proceedings. Thus, in light of *Breed,* these cases might be decided differently today.[4] *Bradley* turns on the theory that jeopardy does not attach at a hearing before a referee; however, this Court, with the advantage of the Supreme Court's language in *Breed,* has already determined that jeopardy does attach at a hearing before a master. The Colorado court's theory of "continuing jeopardy" constituting only one proceeding has been criticized. *See* Whitebread & Batey, *Juvenile*

[4] Since the submission of final briefs in this case, counsel for the defendants has brought to the Court's attention two recent California cases concerned with review by juvenile court judges of referee's decisions. In *Jesse W. v. Superior Court of Mateo County,* 133 Cal. Rpt. 870 (1976), the court persisted in finding, as had the courts in the pre-*Breed* cases, that the subordinate judicial powers of the referees made their determination non-adjudicatory and that therefore there was a "continuing" jurisdiction over a case assumed by the juvenile court judge. "Presiding" power was held not to be the equivalent of "decisional" power. *Jesse W.* does not, in the opinion of this Court, square with the teaching of *Breed*, and the California court's holding that even though jeopardy attached at the referee's hearing it is somehow of less than constitutional magnitude seems to be in error. Counsel for plaintiff in the instant case has informed this Court that *Jesse W.* is on appeal to the Supreme Court of California and thus is of little persuasive value. A second case, *In re Anthony M.,* 64 Cal. App. 3d 464 (1976), does not even cite *Breed* and is clearly concerned with the impact of a juvenile's request for a rehearing, to which he is entitled as a matter of state law in California. Although there is, at 543, general language alluding to the subordinate status of the referee's opinion, the focus of the court's concern is upon the validity of a juvenile court's assessing a more severe penalty upon the rehearing of the juvenile's case.

Double Jeopardy, 63 Geo. L. J. 857, 878 (1975). The same result is unlikely today in light of the statement in *Breed* that ". . . the fact that the proceedings against respondent had not 'run their full course' [Citation omitted], within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." *Breed* at 534. Thus, these cases are of little precedential value to this Court.

Several policies underlie the double jeopardy prohibitation. The policies which most concern this Court now were best stated by Justice Black in *Green v. United States,* 355 U.S. 184, 187-188 (1957).

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * * The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

A third policy relevant here is that the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. *See* Comment, *Twice in Jeopardy,* 75 Yale L. J. 262, 266-67, 277-78 (1965). Here, the defendants can take an exception under Rule 910e [Rule 911c] to a recommended disposition of probation to argue for detention before the juvenile judge.

The defendants have argued that jeopardy does not terminate with the submission of the proposed findings and recommendations by the master to the judge, but rather continues until the trial court is able to make an

adjudication. In the past the concept of "continuing jeopardy" has only been applied in cases in which the defendant has successfully obtained a second trial. *See Jones v. Breed,* 497 F.2d 1160, 1167 (9th Cir. 1974). In recent years the Supreme Court has dealt with double jeopardy cases where the Government has taken an appeal. In *United States v. Wilson,* 420 U.S. 332, (1975), the Government appealed the grant of a postverdict motion for dismissal after the jury had entered a guilty verdict. However, the Third Circuit Court of Appeals barred review of the District Court's ruling on the ground of double jeopardy. The Supreme Court reversed on the ground that the constitutional protection against Government appeals attaches where there is danger of subjecting the defendant to a second trial for the same offense. There was no such danger in *Wilson* because, if the District Court's ruling was overturned, the jury verdict could simply be reinstated. Although the Court permitted the Government to appeal in such situations, the Court stated:

> . . . we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disservice the defendant's legitimate interest in the finality of a verdict of acquittal.

United States v. Wilson, supra at 352.

The same day the Court ruled in *Wilson* it announced its decision in *United States v. Jenkins,* 420 U.S. 358 (1975). There, after a bench trial, the District Court "dismissed" the indictment and "discharged" the respondent. The Second Circuit dismissed the Government's appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further

prosecution." Since the Court was unsure whether the District Court had based its decision on a determination of facts or on a resolution of a legal question, *Wilson* could not govern the case. The Court concluded:

> . . . [I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause . . .

United States v. Jenkins, supra at 370.

Thus the defendants' contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme Court in this context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge. The defendants' argument is basically that under the statutory scheme the hearing before the master and the later review by the juvenile judge are part of one continuing proceeding. The Supreme Court has stated that such an argument "does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." *Breed v. Jones, supra* at 534.

The argument that the hearing before the juvenile judge may only be on the record and not *de novo* does not alter the inescapable conclusion. The most important element is that the State has more than one opportunity to convince a trier of fact of the guilt of the juvenile. In *Jenkins, supra,* the Supreme Court found

that the Double Jeopardy Clause would be violated even if no additional evidence were to be taken by the trial court. *Jenkins* at 370. Interestingly in *Breed* the case in the adult criminal court was "submitted to the court on the transcript of the preliminary hearing." *Breed* at 525. Thus, it is not the taking of additional evidence or the conducting of a *de novo* hearing that violates the Double Jeopardy Clause; it is the subjecting of the juvenile to a second proceeding at which he must once again marshal whatever resources he can against the State's and at which the State is given a second opportunity to obtain a conviction. Merely declaring that the two proceedings are one does not answer these intrusions upon the policies of the Double Jeopardy Clause.

Although Rule 910e [Rule 911c] violates the Double Jeopardy Clause, this Court must consider if giving the juvenile the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile court system. *See Breed v. Jones, supra* at 535. The defendants have offered no explanation of how the master system fosters the flexibility and informality of the juvenile court system. They do assert that if the master system is struck down by this Court that the case load would be too burdensome for the only juvenile judge currently sitting in Baltimore City. The Report of the Committee on Juvenile and Family Law and Procedure to the Maryland Judicial Conference (1976) recommends that the juvenile master system be eliminated and that all juvenile proceedings requiring judicial attention be handled by a juvenile court judge. The Report stated in part: "No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the 'step child' of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal behavior in general to be shunned and ignored as something beneath the dignity of a judge." Thus, the master system not only does not foster any of the goals

of the juvenile court system, it may be a detriment. *See* also Final Report of the Commission on Juvenile Justice to the Governor and the General Assembly of Maryland, January 1, 1977.

Another factor to be considered in deciding whether a constitutional right should be applied to juvenile proceedings is the recommendations of various studies and model acts dealing with the juvenile court system. *See In Re Gault,* 387 U.S. 1 (1967); Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Wm. & Mary L. Rev. 266, 275 (1972).

There are three pieces of model legislation in the area of juvenile law: the *Standard Juvenile Court Act,* prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's bureau (6th Ed. 1959), hereinafter "Standard Act"; the *Uniform Juvenile Court Act,* approved by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter "Uniform Act"; and Model Act for Family Courts and State-Local Children's Programs, prepared by the Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter "Model Act". Section 7 of the Standard Act provides in part, "The judge may direct that any case . . . shall be heard in the first instance by a referee . . . but any party may, upon request, have a hearing before the judge in the first instance." Any party may then file with the judge a request for review of the referee's findings and recommendations. Section 7(b) of the Uniform Act provides: "The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge." Again any party may request a rehearing by the judge. Section 4(b) of the Model Act provides:

> Delinquency and neglect hearings shall be conducted only by a judge if:
>
> (1) The allegations set forth in the neglect or delinquency petition are denied;
>
> (2) The hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or
>
> (3) A party objects to the hearing being held by a referee.
>
> Otherwise, the [judge] may direct that hearings in any case or class of cases shall be conducted by a referee in the manner provided by this (act).

Any party shall receive a hearing if he requests one.

The differences between these model laws and Maryland's statutory scheme are obvious. All the model acts permit any party to have the case heard in the first instance by the judge. Rule 910e [Rule 911c] of the Maryland Rules of Procedure does not permit this right. The Model Act, which is the most recent of the model legislation, also takes away from the referee or master delinquency and neglect hearings if the allegations set forth in the neglect or delinquency petitions are denied. Thus, the master would only hear routine matters that do not require the qualifications of a judge. These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings.

Accordingly, it is this 16th day of September, 1977, by the United States District Court for the District of Maryland, ORDERED:

1. Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge; and

2. Defendants, their agents, employees, persons acting in concert with them, and their successors in-office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

HARRISON L. WINTER
United States Circuit Judge
Name not ledgeable
United States District Judge
Name not ledgeable
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In the United States District Court
For the District of Maryland

Civil Action No. Y-74-1291

Donald Brady, et al.,
Plaintiffs,
v.
William Swisher, et al.,
Defendants.

---

1. Notice is hereby given that all Defendants in this action hereby appeal to the Supreme Court of the United States from the final order entered in this action on September 16, 1977, declaring Md. Ann. Code, Courts and Judicial Proceedings Article, Section 3-813 and Rule 910e (Rule 911c) Maryland Rules of Procedure as

unconstitutional under the Double Jeopardy Clause of the Fifth Amendment to U.S. Constitution to the extent that these provisions permit the state to file exceptions (a) to a juvenile court master's findings of non-deliquency and try the juvenile a second time before the juvenile court judge or (b) to a juvenile court master disposition and seek a new disposition before the juvenile court judge and permanently enjoining the Defendants from taking exceptions to findings of non-delinquency or from taking exception to disposition.

2. This appeal is taken pursuant to Title 28, United States Code Section 1253.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland.
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
Attorneys for Appellants.

PROOF OF SERVICE

I, George A. Nilson, Deputy Attorney General, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of October, 1977, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Plaintiffs by mailing copies in duly addressed envelopes with first class postage prepaid, to their attorney of record as follows; Peter Smith, Esquire, 500 W. Baltimore Street, Baltimore, Maryland 21201.

GEORGE A. NILSON,
Deputy Attorney General.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life on limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of lie, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 3-813. Masters.

(a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.

(b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.

(c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

(d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.

(e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, it all parties and the court agree, the hearing may be on the record. (1975, ch. 554, §§ 1, 3.)

Rule 910. Hearings — Generally.

a. *Before Master or Judge — Proceedings Recorded.*

Hearings shall be conducted before a master or a judge without a jury. Proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means.

b. *Place of Hearing.*

A hearing may be conducted in open court, in chambers, or elsewhere where appropriate facilities are available. The hearing may be adjourned from time to time and may be conducted out of the presence of all persons except those whose presence is necessary or desirable. If the court finds that it is in the best interest and welfare of the child, his presence may be temporarily excluded except when he is alleged to have committed a delinquent act.

c. *Minimum Five Day Notice of Hearing — Service — Exception.*

Except in the case of a hearing on a petition for continued detention or shelter care pursuant to Rule 912 (Detention or Shelter Care), the clerk shall issue a notice of the time, place and purpose of any hearing scheduled pursuant to the provisions of this Chapter. This notice shall be served on all parties together with a copy of the petition or other pleading if any, in the manner provided by section c of Rule 904 (Duties of Clerk) at least five days prior to the hearing.

d. *Multiple Petitions.*

1. Individual Hearings.

If two or more juvenile petitions are filed against a respondent, hearings on the juvenile petitions may be consolidated or severed as justice may require.

2. Consolidation.

Hearings on juvenile petitions filed against more than one respondent arising out of the same incident or conditions, may be consolidated or severed as justice may require. However, (i) if prejudice may result to any respondent from a consolidation, the hearing on the juvenile petition against him shall be severed and conducted separately; and (ii) if juvenile petitions are filed against a child and an adult, the hearing on the juvenile petition filed against the child shall be severed and conducted separately from the adult proceeding.

e. *Controlling Conduct of Person Before the Court.*

1. *Sua Sponte* or On Application.

The court, upon its own motion or on application of any person, institution, or agency having supervision or custody of, or other interest in a respondent child, may direct, restrain or otherwise control the conduct of any person properly before the court in accordance with the provisions of Section 3-827 of the Courts Article.

2. Other Remedies.

Subtitle P (Contempt) of Chapter 1100 of these Rules is applicable to juvenile causes, and the remedies provided therein are in addition to the procedures and remedies provided by subsection 1 of this section. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)

Rule 911. Masters.

a. *Authority.*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. *Report to the Court.*

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. *Review by Court if Exceptions Filed.*

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served

upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. *Review by Court in Absence of Exceptions.*

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

DOCKETED NOVEMBER 7, 1977
PROBABLE JURISDICTION NOTED NOVEMBER 28, 1977

TABLE OF CONTENTS

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

DOCKETED NOVEMBER 7, 1977
PROBABLE JURISDICTION NOTED NOVEMBER 28, 1977

DOCKET ENTRIES

Brady, et al. v. Swisher Y-74-1291

1974

Nov. 25—Motion of plaintiffs to proceed in forma pauperis; Order (Miller, J.) granting leave as prayed; points and authorities and (9) affidavits.

Nov. 25—Complaint.

—Nov. 25—Summons issued. (Each served- 26 November 1974).

Nov. 25—Application for 3 Judge Court; points and authorities in support thereof; and attachments.

Dec. 10—Notification and Request (Thomsen, J.) to constitute a Three Judge Court.

Dec. 17—Motion of Defendants and Order (Thomsen, J.) extending the time within which Defendants may file a responsive pleading to and until and including January 6, 1975.

Dec. 20—Order (Haynsworth, Chief Judge, U.S. Cir. Court of Appeals) dated 17 December 1975, designating Honorable Harrison L. Winter, U.S. Cir. Judge, Honorable Edward S. Northrop, Chief Judge, U.S. District Court, to serve with the Honorable Roszel C. Thomsen, Senior United States District Judge, to constitute a Three-Judge Court.

1975

Jan. 6—Motion of Defendants to Dismiss Complaint and Memorandum of Law in Support thereof. (Two copies submitted).

Feb. 6—Request of Plaintiffs for Production of Documents and Things for Inspection, Copying and Photocopying propounded to James Klair and Bernard Raum, Attorneys for Defendant James Benton.

Feb. 7—Answer of Defendants to Request of Plaintiff for Production of Documents and Things for Inspection, Copying and Photocopying.

March 7—Petition of Plaintiffs for the Issuance of Subpoenaes at the Expense of the United States Government and Order (Thomsen, J.) GRANTING same as prayed.

March 11—Notice of Plaintiff to take Deposition of the Honorable U. Theodore Hayes, on March 14, 1975.

March 12—Petition of Petitioner for the Issuance of Subpoenaes at the Expense of the United States Government and Order (Thomsen, J.) thereof.

Apr. 7—Motion of Plaintiffs for Certificate as a Class Action. (Copies Submitted).

Apr. 10—Answer of Defendants in Opposition to Motion of Plaintiffs' Motion For Certificate as a Class Action.

Apr. 21—Memorandum of Plaintiffs in response to Defendants' Answer in opposition to Motion for Certification as a Class Action. (2 cys. submitted).

July 17—Motion of Respondents and Order (Thomsen, J.) authorizing Respondents to file a supplemental pleading in a form of a motion to dismiss. (Copies submitted).

July 17—Motion of Respondents to Dismiss. (Copies submitted).

Dec. 8—Memorandum of Plaintiffs' in Response to Motion of Defendants to Dismiss. (cys. submitted).

Dec. 8—Motion of Plaintiffs for leave to file Supplemental Pleading, Points and Authorities in Support thereof, Proposed Order. (cys.)

Dec. 8—Motion of Stevie Jacobs, Dennis Green and Steven Stencil for leave to intervene as plaintiffs, Points and Authorities in support thereof, Proposed Intervenors' Complaint, and Proposed Order (2c/s).

Dec. 22—Order (Winter, U.S. Cir. Judge) Designating Honorable Joseph H. Young, U.S. District Judge, in the place and stead of Honorable Roszel C. Thomsen, U.S. District Judge, to Constitute a Three-Judge Court. (Copies mailed to counsel 12-23-75 now).

1976

Jan. 27—Scheduling Conference held before Young, J.

Feb. 17—Order (Young, J.) "Granting" motion of plaintiffs for leave to file supplemental pleading. (See paper No. 20) (Cys. mailed 2/23/76).

Feb. 17—Supplemental Complaint. (See paper No. 20).

Feb. 17—Order (Young, J.) "Granting" motion of Stevie Jacobs, Dennis Green and Steven Stencil for leave to intervene as party plaintiffs. (See paper No. 21) (Cys. mailed 2/23/76).

Feb. 17—COMPLAINT of intervening plaintiffs, Stevie Jacobs, Dennis Green and Steven Stencil. (See Paper No. 21).

Feb. 17—Motion of respondents to dismiss and memorandum in support thereof. (C/S) (Received for filing February 13, 1976).

Feb. 20—Motion of Paul Meadows for leave to intervene as party plaintiff, points and authorities in support thereof, proposed order and proposed complaint. (c/s).

Feb. 20—Memorandum of plaintiffs in opposition to motion of defendants to dismiss, and attachments. (c/s).

Mar. 4—Motion of defendants for Relief from Order granting Leave to Intervene filed on February 17, 1976, and in opposition to Motion of Paul Meadows for Leave to Intervene as Party Plaintiff, Memorandum of Points and Authorities in support thereof, and Exhibits A through D. (c/s).

Mar. 5—Hearing on Motion of defendants to Dismiss, held before Young, J.

Mar. 5—Order (Young, J.) "DENYING" Motion of defendants to Dismiss. (See Paper No. 27).

Mar. 26—ANSWER of defendants.

Apr. 13—Petition of plaintiffs, and Order (Young, J.) that the Clerk issue and the U.S. Marshal serve

subpoenaes on The Honorable Paul A. Smith, The Honorable Howard Golden, Joseph Szuleski, E. Nicholson Gault, and James Louis Benton, Jr. at the expense of the United States Government.

Apr. 19—Evidentiary hearing held before Young, J.

Apr. 19—Not concluded — to be continued at a later date.

May 18—Joint Stipulations of Fact re: Testimony of E. Nicholson Gault, and Attachments. (c/s).

May 18—Joint Stipulations of Fact re: Testimony of Paul A. Smith. (c/s).

May 18—Joint Stipulations of Fact re: Testimony of Howard Golden. (c/s).

May 18—Joint Stipulations of Fact re: Testimony of Joseph Szuleski, and Attachments. (c/s).

May 21—Motion of Eugene Fields for Leave to Intervene as Plaintiff, Points and Authorities in support thereof, Proposed Intervenor's Complaint, and Proposed Order. (c/s).

May 25—Stipulation of Counsel, Re: Testimony of Hon. Robert L. Karwacki. (c/s).

May 25—Joint Stipulations of Fact, Re: Testimony of Leonard Briscoe, Theodore Hayes, John O'Grady, Bernard Peter and Bright Walker.

May 27—Supplemental Pre-trial Memorandum of defendants. (c/s).

May 28—Hearing held before the Court, Winter, Cir. J., Northrop, C.J. and Young, J.

May 28—Argument of Counsel.

May 28—Hearing not concluded — to be resumed Tuesday, June 1, 1976.

June 1—Hearing continued from May 28, 1976.

June 1—Motion of plaintiffs, and Order (Winter, Cir. J.) that William Swisher is substituted for Milton B. Allen and E. Nicholson is substituted for Barbara Daly as Party Defendants. (C/M).

June 1—Argument of Counsel (continued).

June 1—Held sub-curia.

July 20—Certified copy of Masters's Report and Recommendation and Order of Court thereon filed in the Circuit Court of Baltimore City, Division for Juvenile causes, dated June 18, 1976.

1977

June 20—Motion of Plaintiffs and Order (Young, J.) Substituting Sheldon Mazelis for E. Nicholson Gault, as a Party Defendant. (c/m 6/23/77 v.s.)

Sep. 16—Memorandum and Order (Winter, Circuit Judge, Northrop, C.J., and Young, J.).

Sep. 20—Judgment: 1) That Md. Ann Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's finding of non-delinquency and try the juvenile a second time, before the juvenile court judge, or (b) to a juvenile court master disposition and seek a new disposition before the juvenile court judge; 2) That defendants, there agents, employees, persons acting in concern with them, and their successors in office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure. Order (Clerk) dated September 19, 1977 with approval of the Court (Young, J.) thereon. (c/m 9/19/77).

(Oct. 14—Notice of Appeal of Defendants to the Supreme Court of the United States.

Oct. 17—Letter to Counsel, — Re: possibility of preparation of Record on Appeal, pursuant to Rule 12, Rules of the Supreme Court.

WHAT MAY BE FOUND IN THE APPENDIX TO THE JURISDICTIONAL STATEMENT

1. Memorandum and Order of the District Court
2. Notice of Appeal to Supreme Court of the U.S.
3. Pertinent Constitutional Provisions, Statutes and Rules
   a. Fifth Amendment to U.S. Constitution
   b. Courts and Judicial Proceedings Article, Section 3-813 (Md. Code)
   c. Maryland Rules of Procedure, Rules 910-911

EXCERPTS FROM TESTIMONY OF EVIDENTIARY HEARING HELD ON MARCH 17-18, 1975

JAMES BENTON

(T. 25, 41)

* * * * * *

A. A case becomes a case when a Petition is filed in my office which has been submitted from the police to our intake department to the State's Attorney's office, who, then, following a review would give it a number and submit it back to the Intake department for authorization, which is then forwarded to me to be filed as a Petition which would be scheduled for Hearing before our Court.

* * * * * *

Q. Now, after the Juvenile Services Intake consultant authorizes the Petition by signing it and dating it in the lower left hand corner, what, then, happens to that Petition? A. These Petitions are then forwarded to my office which is designated the Clerk's Office for preparation as to filing and scheduling for arraignment in the case of delinquency cases.

* * * * * *

MASTER AVRUM RIFMAN
(T. 9-10)

* * * * * *

Q. Master Rifman, you testified earlier that your duties included Hearings, Adjudicatory Hearings charging delinquency; briefly describe to the Court what occurs at an Adjudicatory Hearing in which the respondent is charged as a delinquent?

(Mr. Raum) Objection, Your Honor. He has already stated he takes testimony and holds a Hearing and makes findings of facts and recommendations.

(The Court) I'll take it subject to exception.

(Mr. Raum) I'm sorry; I was just trying to keep the record in some kind of containable fashion. That's all.

(The Court) Well, let's go off the record.

(Whereupon, there was an off the record discussion.)

(The Witness) When the case is called for trial in the morning, we must make sure — I make sure that counsel representing the Defendant — the majority of cases are indigent cases and we have the Public Defender system in full operation.

The State, of course, is represented by the State's Attorney.

(The Court) Is there always someone from the State's Attorney's office there?

(The Witness) Yes, sir. In every delinquency case, we cannot proceed to conduct a Hearing unless and until the State's Attorney is present, unless the Defendant — the Respondent, we call them, and his parent have knowingly waived the right of counsel and, then, we must make sure that all the constitutional rights are given to the youngster and his parents. In some instances, very few instances, the parents don't want counsel and then they can't get the appointment of the

Public Defender because they're above the poverty level. I might say they do just as well because we have greater concern, if possible, where they are unrepresented, than if they were represented. Sometimes, we lean backwards to make sure that every constitutional right is protected.

After that's done and the case proceeds to trial, we first read the Petition to the Respondent. The Petition is very brief and it's a summary of the statutory evidence. Usually, denial is entered. In these cases where there's an admission, the admission must be signed by the Respondent, by his parent or guardian ad litem and the Public Defender.

Then, after that, we take the admission and we advise the right of the Defendant to have a plea disposition investigation. In many cases, they decide to have a disposition held that day and in an equal number of cases they decide to have an investigation and report.

* * * * * *

HONORABLE ROBERT I. H. HAMMERMAN
(T. 122-125)

(The Witness) I thought I — I may have misunderstood the question. I thought I already responded to that question when I indicated the degree to which I read the memoranda which was that I don't read them thoroughly, except in some cases. I will peruse them, usually, but not a reading in the sense we talk about a reading of them.

Q. You had made that reference earlier in connection with another question but it was not actually posed as a question to you and I wanted to be sure it was in the record.

Now, to what extent, Judge, does the reading of the memoranda in those cases in which you receive them and other materials in those cases where you receive other materials from the Master, enable you to know

what, actually, took place at the Masters' Hearing? A. You're asking to the extent that I read memoranda?

Q. Precisely. A. I would say that to the extent that I read or peruse the memoranda in the great majority of cases, I do not have a full understanding of what transpired before the Master at the Hearing before him.

Q. Judge, are you familiar with the provisions of Rule 908 of the Maryland Rules of Procedure? A. I believe so.

(The Court) Do you have it here so I can look at it?

* * * * * *

By Mr. Smith:

Q. Now, referring you to that portion of 908, which I believe is 908(e) which authorizes the Juvenile Court Judge to modify or remand a recommendation made in a case in which the Hearing was before the Master, 908(e) 2 and 3, I believe are the pertinent provisions. How often could you say that you have occasion, under that Rule, per year, to modify or remand a recommendation from a Master in a case heard before him and I want to make this clear—

(The Court) You mean, in the absence of an exception?

By Mr. Smith:

Q. I want to make it clear that I'm not talking about de novo Hearings before the Judge, simply where the cases which come to you, not de novo, on recommendations from the Master.

(Mr. Raum) Objection. For the record, objection, on the ground of non-exhaustion and relevancy.

* * * * * *

(The Witness) I would estimate and I personally keep no figures on this, maybe four to nine times a year would be an average.

(The Court) Four to nine times a year. You mean, you don't follow the recommendation, except where there is an exception?

(The Witness) That is correct, sir.

By Mr. Smith:

Q. That answer includes both modifications and remands? A. That's correct.

Q. Now, of these, approximately four to nine times a year, Judge, could you estimate how many of those occasions, the precipitating reason for your either modifying or remanding is your own action upon observing the materials before you and to what extent the precipitating reason is an outside force? A. I would say the majority of the times, it's outside forces, as you describe it.

(The Court) What do you mean, an outside force?

(The Witness) The outside force would be someone involved, an interest involved with, an interest in the case who does not follow the route of taking an exception but who comes to speak to me about the recommendation of the Master and as a result of that discussion, I would decide to modify or remand and reject the recommendation.

* * * * * *

MASTER PAUL SMITH

(T. 229-240, 245-247, 249-255, 258-259)

Q. Now, asking you to focus for a moment in the delinquency situation, Master Smith, on the adjudicatory Hearing, would you describe what takes place in such a Hearing when the matter is called before you for the commencement of that Hearing and follow it through. A. The delinquency cases, the order in which they're called is determined by the State's Attorney. He would indicate what cases he is calling and my Bailiff would take the folder containing the Clerk's file from the stack of other folders which may be, have been referred to me, on that day. He would have previously given to me one copy of that Petition, which we usually call the note copy of the Petition, to inform me of what the charge is. He would read the Petition. The State

would present its case. The witnesses would be called. They would be individually sworn. They would be subjected to direct testimony and then cross-examination. At the conclusion of the State's case, the defense, normally, makes a motion to dismiss. If it's denied, the defense would then present its case by presenting witnesses and have them sworn, individually, and at the conclusion of the defense's case, we would hear argument and after argument, reach a decision about whether the charge was or was not sustained.

Then, I would, in reaching the conclusion, announce my finding to the persons who are there at that time, explaining the reasons why I reached the conclusions that I did and, usually, referring back to the evidence which I heard and relating it to the elements of the offense and, I usually terminate the adjudicatory Hearing by announcing that I find the delinquent act to be sustained.

Q. Now, at the adjudicatory Hearing that you have just described, do you, in fact, observe the demeanor of witnesses who testify? A. Yes, each witness who is called, I observe the demeanor of that witness while he is sitting on the stand. As a practical matter, the Hearing Rooms are small. I look about the Hearing Room and observe the demeanor of prospective witnesses before they are called and after they are called.

Yes, I do take into consideration the demeanor of witnesses both on the stand and off the stand.

Q. Now, having stated that you observe it, what, if any, significance, then, do you attach to what the demeanor is of the witnesses who testify before you? A. Well, depending upon what their demeanor is, it may or may not help me in determining their credibility, and, usually, that's primarily how it's used.

Q. Do rules of evidence apply in your adjudicatory proceedings? A. Oh, definitely.

Q. And, what rules are they? A. In terms of the introduction of evidence, we apply the same rules that would be applied in an adult criminal proceeding.

Q. Who, if anybody, objects to — excuse me, who, if anybody rules on evidentiary objections posed at the adjudicatory Hearing? A. Well, the Master or the Judge if it is a Hearing before the Judge, who is presiding at that time.

Q. In reaching your findings, what standard of proof is applicable in the delinquency — adjudicatory Hearing? A. By statute, the standard of proof is that the trier of fact be convinced beyond a reasonable doubt.

Q. Now, asking you to focus upon the very end part of the adjudicatory Hearing, after the closing arguments that have been made and you're announcing your findings, could you specify, precisely or at least generally, what kind of words you would use in the typical adjudicatory-delinquency Hearing to communicate to the respondents your view as to the act, the delinquent act being sustained or not sustained? A. Well, based on experience, I find, sometimes, when we use the language which is included in the statute — it's a little different from Criminal Court language, and a lot of people do not immediately seize the meaning of what you mean when you say, "delinquent act sustained," so I normally analogize it to words I think they are familiar with, in other words, I say I find you did commit the act you are charged with. If this were an adult court, I would announce, you're guilty of the charge, I find you guilty. That's, basically, the language I use in almost every case.

Q. Now, a moment ago, you indicated that, in announcing your findings, you comment and summarize the evidence; do you reduce to writing any findings which you announce to the persons in the courtroom? A. During the conduct of the Hearing, as each witness is testifying, I make notes. In some cases, they are very copious notes, and in other cases they may be

sparce. At the conclusion of the Hearing, after listening to both counsel, sometimes I have to review them. Sometimes, I don't. Most of the time I don't have to review the notes. As far as reducing to writing, the findings, it is reduced to writing, primarily, by the phrase, "delinquent act sustained," rather than to recapitulate, in writing, what I have orally said was the basis for my finding.

On my notes, I enter the entry "delinquent act sustained," and at that time, or about that time, my Bailiff will enter the same words that I used, as a matter of fact, it's supposed to be verbatim in every case on the docket sheet which, ultimately, will be sent back to the Clerk's Office.

Q. You said you entered the words, "delinquent act sustained," obviously, in a case where that was your finding. A. Yes.

Q. Where do you enter those words?

(The Court) Where does he enter them?

(Mr. Smith) Yes.

(The Court) He said the Bailiff enters them.

(Mr. Smith) He said he did and his Bailiff did.

(The Witness) I enter them on my notes, usually at the end of my notes. My Bailiff enters them on the docket sheet.

By Mr. Smith

Q. Thank you. A. And, my Bailiff also would enter it on the assignment sheet.

Q. Now, in your courtroom, Master Smith, what, if any, practice do you follow respecting advising the respondent or his family that in the delinquency — in the adjudicatory Hearing, that your finding in the adjudicatory Hearing is a recommendation to the Judge? A. I don't make the recommendation during the adjudicatory Hearing. I don't give that advice or give that notice during the adjudicatory Hearing. I give

it at the conclusion of the adjudicatory Hearing. Normally, it would be reserved until the disposition Hearing, anyway because, as a practical matter, the finding I make would not be communicated to the Judge until after disposition is made.

Q. So, as of the time that the adjudicatory Hearing, itself, ends, setting aside for a moment the disposition Hearing, do you or do you not make any statement to the child at the end of the adjudicatory Hearing respecting your finding being a recommendation, only? A. All right. It would depend. If disposition is going to be made at that time because there is sufficient information in the Hearing Room that I have not yet been privy to, but I'm going to hear about, after reaching a finding, I would normally not give that advice until after disposition is made. This is on the assumption disposition is made immediately after the adjudicatory Hearing. Now, if disposition is going to be postponed or deferred until some other day, yes, at that point, I advise the youngster that he has a right to take an exception from my finding. He can take it on that day or within five days after that day or he may defer making that decision until after I have made disposition since he can take exception on the day of disposition or within five days after disposition.

Q. Now, focusing on the situation in which the disposition Hearing is postponed until a later date, that is, where you just have an adjudicatory Hearing that day, you just testified that you would advise the child, in that situation of his right to take an exception? A. Yes.

Q. Do you or do you not also advise the child at that point that your recommendation is a recommendation, only? A. No.

(The Court) I thought he did tell the child that he had the right to take an exception.

(The Witness) I do, but that wasn't the question.

(Mr. Smith) The question I asked now, however, was another question. That is, does he also advise the child

at that point that his finding is a recommendation, only, and his answer to that was no.

(The Witness) No, because I don't communicate that finding to the Judge at that point and it is not, is not what I consider to be a recommendation until such time as I'm recommending some action to the Judge. At that point, I'm not recommending any action to the Judge.

By Mr. Smith:

Q. Now, what, if any, practice do you follow at the conclusion of the adjudicatory Hearing, in which the child is, in which you announce that in your view, the child is not guilty or the charges are not sustained?

What, if any action do you take with respect to advising the child or his family of the right of the State to take an exception? A. All right, in those cases where I find that the evidence is insufficient to sustain the charge and I indicate that my finding at the end of that Hearing is that the charge is not sustained, I do advise the youngster that the State's Attorney has the right to take an exception and that if they do, he'll hear from the Clerk of the Court, but if the State's Attorney's Office does not, and he does not hear from the Clerk of the Court within a reasonable period of time, he can assume that the recommendation which I made, that the case, you know, the charge be not sustained is the final recommendation in that case.

Q. Now, you referred earlier to the fact that you take notes in a case which might be anything from copious to sparce, depending on the particular case? A. Yes.

Q. What do you do with those notes after you take them at the conclusion of the case? A. Well, since we're not a Hearing Room of record, everything we do in the Hearing Room, we basically annotate on a note copy of the Petition. This is a copy of the Petition which is blank on the back side. Everything that myself or any other Master does in connection with that particular case, which should be annotated on the back of the Petition, when it came in for arraignment, if it came in for detention Hearing. If anything else took place prior

to the adjudicatory Hearing, it would have already been annotated on that form before I began to enter my notes, but if I hold the adjudicatory Hearing and I find the charge to be sustained or if I find the charge to be not sustained, I keep the notes. Probably, no one else could understand them, anyway, as bad as my handwriting is and there is no procedure for sending them any place else. We maintain file cabinets in which they are filed by my secretary and used sometimes for further reference.

Q. Now, in those instances in which they are used, sometimes, for further reference, who would they be used by? A. Primarily by me. If anyone else had any question, however, about a youngster, whether it be another Master, whether it be a Probation Officer, we could go to the file and pull the notes and discuss, at least, what the notes would refresh my memory in terms of what happened on that day or in terms of why I made a particular recommendation to the Judge.

Q. Now, in your three and three quarter years as a Juvenile Court Master, how often, if to any extent, have you had occasion to share the contents of those notes with the Juvenile Court Judge? A. You mean in terms of — at any time?

Q. Well, let me clarify — while the case — prior to the case being — an Order being signed in the case by the Judge? A. Never.

Q. Never? A. Never.

Q. After the Hearings that you've had and I'm referring now to the various range of Hearings that you have in delinquency cases, does there ever come an occasion when you have or you have your office prepare a proposed Order for the Judge to sign? A. Yes.

Q. Now, in those instances in which that is done, that is, a proposed Order is prepared, what, if any information would be contained, placed by you or your Bailiff on either the face of the Order or the back of it, purporting to set forth what actually took place at the Hearing, that is, evidence and testimony, say? A.

Well, in the first place, there is only two instances in which I would prepare memoranda and an Order. There is only one instance in which I would prepare the Order, I am sorry, two instances where I would prepare a memoranda.

If I were recommending that a youngster be detained, there is a memoranda that we prepare and make a part of the Clerk's file. I don't send that to the Judge, though. I simply include it in the Clerk's file, and it is sent back to the Clerk's Office.

In those cases where we commit or recommend that the youngster be committed to a juvenile institution, then, my secretary prepares the Order and I attach to it a memoranda to inform the Judge of how the case came about, what happened during the adjudicatory Hearing and why I am making this recommendation.

* * * * * *

Q. Now between the time that the hearing in which you recommend Commitment comes to an end and the time that the papers do go to the Judge for signature, what, in fact, would happen to the child? A. It depends on — if it's a recommendation for commitment—

Q. That's what I'm talking about. A. —and the parties do not indicate that an exception to my decision or recommendation is being made on that day, then, the youngster is turned over to the juvenile authorities, transported to the appropriate juvenile facilities and he is housed there.

The Order which is signed, you know, within the — which is signed by the Judge and to which the youngster has a right to take an exception for five days, I suppose you would say relates back, then, to the day he actually is transported to the juvenile facility.

Q. Thank you, now, let's take a case, Master Smith, in which the child has been detained, pending the adjudicatory Hearing and, then, brought in for the adjudicatory Hearing and you make a finding of non-delinquency in that case. What happens to the child

between the time that you make that finding of non-delinquency and the time that the Judge would receive the proposed Order of non-delinquency to sign?

(The Court) You are assuming that the child has been in detention?

(Mr. Smith) I'm assuming that the child was in detention prior to his adjudicatory Hearing.

(The Court) Pending the Hearing?

(Mr. Smith) That's right.

By Mr. Smith:

Q. He comes to the adjudicatory Hearing. You have the Hearing. You make a finding of non-delinquency; what happens to the child between the time that you make that finding and when the proposed Orders are received by the Judge and signed? A. If I have no other basis for recommending that he be kept in custody, he is released.

* * * * * *

By Mr. Smith:

Q. What, if any, authority would you have at that very juncture to release the child immediately to his parents, pending the disposition Hearing which would be held subsequently? A. I would have the authority to release him to his parents or to recommend that he be detained until after additional information is obtained in order to make the appropriate recommendation.

If I recommend he be detained on that day, he would be detained subject, of course, to the right of the youngster to take an exception from that decision. If I recommend he be released, he would be detained, I mean, he would be released and at that time, the State — there may be a difference of opinion whether the State has a right to take an exception. I do not believe they do at that point, because I'm making no recommendation to the Judge. That does not mean they could not seek council with the Judge and ask him to consider what I have done and whether it's appropriate or not. I

have had no cases in which that has been done, but it doesn't mean that they couldn't.

Q. Now, when you said detained or released just now, did you mean immediately detained and immediately released? A. Yes, when I recommend release, it means immediately. It means, if he is in custody, if the Sheriff is in the room, or if someone has physical custody of him, that physical custody terminates at that point.

* * * * * *

By Mr. Smith:

Q. And, where the Judge ordered him detained pending trial, if such a case were then assigned to you for trial and you concluded, at the end of the trial that you're recommending "delinquent act sustained," but you want to postpone the disposition Hearing, would you, in that instance, have the authority to release the child to his parents immediately pending disposition?

(The Court) Is this a question of law or a question of practice?

(Mr. Raum) It's a question of law, Your Honor, the way it's phrased.

(The Witness) It happens often.

(The Court) I think it was phrased as a question of law.

(Mr. Smith) Let me phrase it in terms of the practice.

(The Court) The question is whether it has happened, whether the Judge is the one who had ordered the detention pending trial and the witness has concluded the act is sustained, would he have the right to release the child?

(Mr. Smith) If he wished to postpone the disposition Hearing, would, in practice, you ever have occasion to release the child immediately pending the disposition Hearing?

(The Witness) You have to remember that the Order from the Judge is just that this youngster should be detained until the adjudicatory Hearing. If the adjudi-

catory Hearing is assigned to me, and I hold it, I have the authority at that point to make subsequent recommendations.

(The Court) Because the Order was for pending trial.

By Mr. Smith:

Q. And, would that include the option of his immediate release? A. Yes.

* * * * * *

Q. Now, during your three and three quarter years as a Master in Juvenile Court, when, if at all, has there been the occasion when the Judge has returned to you a proposed Order with instructions to modify or change that Order in any way? A. Never.

* * * * * *

(The Court) You said he never consulted you, that he changed the Order; have you ever discussed with a Judge when you made a recommendation, one way or the other, has the Judge ever asked you to talk to him about the matter before he decided what to do?

(The Witness) Before he decided — No, Your Honor, on only — there has only been about three or four occasions during the entire period of time I have sat there that I discussed a case that was before me with the Judge. In two instances, it was because of correspondence that came in, addressed to the Judge and he referred it to me and I discussed those two cases. These were not cases he was going to hear, de novo, however. In one case, it was because of a review of Court Order Hearing which I had held and denied to change or to recommend that the Order be changed and the person wished to take an exception from that and the Judge did discuss that case with me. He decided it was no right to an exception because I took no action and made no recommendations, but if you mean, has the Judge ever discussed with me why I'm recommending an Order or why he should sign an Order before he signed it, no, he has not.

(The Court) So, so far as you know, he has always adopted your recommendation?

(The Witness) As far as I know, he has adopted it in 100 per cent of the cases.

* * * * * *

By Mr. Smith:

Q. Do you ever observe, actual, either physical reactions or hear statements on the part of the respondent after you announce your finding? A. Yes.

* * * * * *

By Mr. Smith:

Q. Would you indicate, if you can, what the nature of those typical reactions or statements would be?

(The Court) The nature — don't they run the gamut?

(The Witness) I guess that's the correct statement about — they do. It's — it depends on what the recommendation is. If it's — if it's at the end of the adjudicatory Hearing and, incidentally, we make a finding at the end of the adjudicatory Hearing. I make no recommendation to the Judge at that time. Normally, it's a reaction to the realization that I have decided that the youngster did or he didn't do it. The reactions may be from the complaining witness or from the respondent. Usually, he is happy if his charge is not sustained. He's sad if it is or from his parents. The reactions come in, however, more prevalently at the disposition Hearing, when I'm making a recommendation to the Judge because, here, they realize that the recommendation is for some action. If I'm recommending detention, the youngster may cry. He may get upset. His parents might get emotionally upset. They may say, please don't take my child, please give me a break, put me on probation, let me walk, any number of things, I've learned my lesson, any number of things, but there is the usual reaction, especially the reaction is more severe, depending on how negative it is as far as the youngster is concerned.

* * * * * *

RUTH KENT

(T. 331-334, 336-338, 340-341)

Q. Mrs. Kent, I'd like to direct your attention to August 16, 1974, and ask you if you had occasion, if there was occasion for you and your son to be in the Juvenile Court of Baltimore City on that day? A. Yes, we were.

Q. Why were you there? A. On August 16, I received a summons to appear in Master O'Grady's Court with my son, Andre.

Q. And, when you appeared in Court that day, did you, in fact, meet Master O'Grady? A. Yes, I did.

Q. And, when you met him, who did you think he was? A. At that particular time, I thought he was a Judge.

(Mr. Raum) Objection, what difference does it make who she thought he was.

(The Court) I'll take it subject to exception and if I give any weight to it in an opinion or if the Court gives any weight to it in its opinion, they will indicate.

By Mr. Elder:

Q. Mrs. Kent, did Master O'Grady announce a finding and recommendation at the end of your son's trial? A. Yes, he did.

* * * * * *

By Mr. Elder:

Q. What finding and recommendation did Master O'Grady announce at the end of your son's trial? A. He found him not guilty.

Q. And, when he announced his finding and recommendation, what did you personally believe the status of the case to be?

(Mr. Raum) Objection, totally irrelevant.

(The Court) Overruled.

By Mr. Elder:

Q. You may answer. A. Well I thought the case was over with and that I could take my son home and we could continue to live normal lives.

* * * * * *

By Mr. Elder:

Q. Now, Mrs. Kent, immediately after the Hearing, what, if anything did your son say in your presence which would indicate what his belief was at that time with regard to the status of the case? A. Well, he was relieved and he made the statement that he was glad that it was all over with because it was a long process of the procedures of the trial.

* * * * * *

Q. Did you notice any differences between the way the trials were conducted the first time in Master O'Grady's Court and the second time in Judge Hammerman's Court?

* * * * * *

(The Witness) I couldn't see any difference because in Master O'Grady's Court, there was the Judge. At that particular time, I thought he was a Judge, sitting making his ruling and what have you and witnesses were called and the same type of thing happened in Judge Hammerman's Court, so I can't see any difference.

Q. Mrs. Kent, were you employed on the date of the Master's Hearing? A. The Master's—

Q. Master O'Grady's Hearing? A. That was in August.

Q. Right. A. The type of work I do, I only work 10 months out of the year, so in August, I would not be employed.

Q. What kind of work do you do, by the way? A. I'm an educational assistant. I work with the Department of Education. I'm presently employed at School 27, that's 100 South Chester Street.

Q. And, I gather school was not in session on August 16th, the date of Master O'Grady's Hearing? A. Right.

Q. And was school in session on the dates of the two Hearings which you referred to before Judge Hammerman? A. Yes.

Q. And, did you lose any compensation as a result of having to appear in Court on those dates? A. Yes and no. I called in and I told the secretary that I would not be in on those particular days.

Now, I think one day I got paid for, and one day I did not get paid for and they have the secretary mark my time. I do not know.

Q. So, you lost only one day? A. Yes.

* * * * * *

By Mr. Elder:

Q. One final question, Mrs. Kent, what was your state of mind with regard to having to appear the second time for trial in front of the Judge after having heard Master O'Grady make a finding that your son was not delinquent? A. I was totally upset. I could not understand getting a second summons in the mail stating that I would have to appear in Court for the second time, when at the first time that the case had been dismissed, my son was let go and, then, to be humiliated again, to go to Court and be subjected under those types of conditions, I was really upset, to no end.

* * * * * *

ROSA CAMPBELL

(T. 344-345, 347-350)

Q. Now, I would like you to refer back to August 16, 1974, and ask you whether you had occasion to be — where you had occasion to be on that date, if you remember? A. Yes, I got a summons in the mail for me to bring William down to Court for that date.

Q. And, did you come down that day? A. Yes. I did.

Q. And, could you tell me to what courtroom you went? A. I went to Court II, in the Juvenile Courtroom.

Q. Do you remember who was the person who was conducting the proceedings in that Court? A. Yes, Master O'Grady.

Q. Now, when you saw Master O'Grady who was conducting the proceedings, who did you think Master O'Grady was? A. I thought he was the Judge.

Q. Now, what, then, happened in the courtroom, Mrs. Campbell? A. They had a trial and everything and, then, my son William was found not guilty.

Q. And, who was it who made that finding of not guilty? A. Master O'Grady.

Q. Now, at the time, right after Master O'Grady announced that finding of not guilty, what did you and your son then do? A. We was happy and relieved that it was all over with, so we thought everything was all over and we just left the courtroom and went home.

Q. Now, did you, thereafter, ever have occasion to return to the Juvenile Court? A. Yes, I got another letter saying that I should bring William back to Court, again.

Q. Now, what was the difference, if any, between that second letter and the first one, if you remember? A. Not any that I remember.

Q. Now, what did you do after you received that letter saying that you should bring your son back to Court, again? What did you next do? A. I was very upset because I knew William hadn't did anything else and I was wondering what was wrong, so I also worked for an attorney, so I called him and I asked him could he be tried for the same thing twice.

* * * * * *

By Mr. Smith:

Q. Now, when you did return to Court for that second Hearing, who was that before? A. Master — I mean, Judge Hammerman.

Q. Judge Hammerman? A. Yes.

* * * * * *

A. Judge Hammerman tried the boys and he didn't make a decision. He had them to come back on the 18th of October.

Q. And, what happened on the 18th of October? A. He placed my son, William, into Maryland Training School.

Q. Maryland Training School? A. Yes.

Q. Now, Mrs. Campbell, what, if any, differences did you observe between the manner in which the Hearing was conducted before Master O'Grady in August and the manner in which the Hearing was conducted before Judge Hammerman in September? A. The only differences that I seen was when Master O'Grady's Hearing, we all sit in the courtroom and heard the testimony and Judge Hammerman, we didn't. He asked them all to go out and they testified, like, coming in whenever they was called. That's the only difference I can—

(Mr. Smith) Thank you.

(The Court) That is, the witnesses?

(The Witness) The witnesses, yes.

By Mr. Smith:

Q. Now, after your son was — At the conclusion of the second Hearing before Judge Hammerman, that is, the second Hearing, would you tell the Court what your state of mind was with respect to the matter of your son having been first tried before Master O'Grady and secondly before Judge Hammerman? A. Well, I was so hurt and disgusted and worried to think my son had been tried once and found not guilty and had to be tried again for the same thing and found guilty and I was very upset about it.

Q. Now, Mrs. Campbell, do you have employment? A. Yes.

Q. And, what is your employment? A. I does domestic work.

(The Court) I didn't hear what you said.

(The Witness) Domestic work.

By Mr. Smith:

Q. Now, on the occasion of August 16, the Hearing before Master O'Grady, if you had not been at that Hearing, would you have been employed on that day? A. Yes, I would.

Q. And, on the occasion of the two Hearings before Judge Hammerman, one was September 16 and the other one was October 18, would you have been employed on either of those days, if you had not been at that Hearing? A. Well, on September 16th I would not have been working because at that time I didn't work on Monday, but on the following October 18th, yes, I was working.

* * * * * *

PLAINTIFFS' EXHIBIT 39

HEARINGS IN DELINQUENCY CASES BEFORE THE MASTERS, CIRCUIT COURT OF BALTIMORE CITY, DIVISION FOR JUVENILE CAUSES, BY MONTH, FOR CALENDAR YEAR 1974.

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Totals
1. Total Number of Petitions—[1]	1203	1118	1089	1542	1492	1352	1376	1238	1286	1369	1035	1213	15,313
2. Total Number of Children[2]	876	835	791	1001	1031	874	942	854	852	973	737	858	10,624
3. Types of Hearings and their Results[3]													
4. Detention Hearings[4]													
5. Children Detained	97	33	55	108	124	105	103	99	147	138	128	124	1,261
6. Children not Detained	77	39	58	77	67	62	42	58	36	52	45	39	652
7. Total of lines 5 and 6	174	72	113	185	191	167	145	157	183	190	173	163	1,913
8. Waiver Hearings[5]													
9. Children Waived	11	10	7	16	39	34	24	17	27	18	18	13	234
10. Children Not Waived But Detained	0	3	2	6	8	8	6	2	2	1	1	1	40
11. Children Not Waived and Not Detained	6	1	0	3	9	2	9	6	7	1	2	0	46
12. Subcuria and Detained	3	0	0	7	7	5	8	1	1	3	0	0	35
13. Subcuria and Not Detained	0	0	0	1	2	2	3	0	0	2	1	2	13
14. Total of lines 9-13	20	14	9	33	65	51	50	26	37	25	22	16	368
15. Adjudicatory Hearings[6]													
16. Dismissed by State's Attorney[7]	196	300	272	296	237	233	239	249	191	202	128	235	2,778
17 Dismissed by Court[8]	9	20	10	22	17	24	28	11	21	28	17	21	228
18. Delinquent Act Not Sustained[9]	58	30	47	59	37	37	33	41	26	54	35	27	484
19. Delinquent Act Sustained But No Delinquent Child[10]	7	19	7	23	19	22	21	8	10	20	14	17	187
20. Delinquent Act Sustained and Delinquent Child — Disposition Postponed													
21. Child Detained Pending Disposition Hearing	56	57	26	39	51	52	32	35	39	53	50	56	546
22. Child Not Detained Pending Disposition Hearing	101	89	87	108	83	80	86	90	79	136	83	100	1,122
23. Total of Lines 16-22	427	515	449	547	444	448	439	434	366	493	327	456	5,345
24. Disposition Hearings Held Immediately After Adjudicatory Hearing[11]													
25. Probation Ordered													
26. To Department of Juvenile Services	87	80	98	102	97	101	78	72	67	84	63	52	981
27. To Parent	20	14	14	11	6	8	12	21	9	13	11	5	144
28. Commitment Ordered	43	51	41	51	64	51	61	44	53	73	47	49	628
29. Restitution Ordered[12]	18	18	23	19	23	23	23	21	11	26	14	18	237
30. Total of Lines 26-29	168	163	176	183	190	183	174	158	140	196	135	124	1,990
31. Disposition Hearings Not Held Immediately After Judicatory Hearings[13]													
32. Probation Ordered													
33. To Department of Juvenile Services	87	35	62	65	80	62	54	72	60	81	79	78	815
34. To Parent	4	0	4	3	7	2	3	5	8	4	4	3	47
35. Commitment Ordered	39	42	34	46	56	27	63	44	69	33	42	40	535
36. Restitution Ordered	9	3	10	7	13	8	8	15	13	14	10	10	120
37. Subcuria	7	8	1	7	0	12	11	16	9	11	12	26	120
38. Total of Lines 33-37	146	88	111	128	156	111	139	152	159	143	147	157	1,637
39. Total of Lines, 7, 14, 23, 30 and 38	935	852	858	1076	1046	960	947	927	885	1047	804	916	11,253

[1] The petition is the document under which the child is charged. It contains a brief statement of the facts alleged to comprise the delinquent act. See Rule 903, Md. R of P. A single child may be charged under one or more petitions and these petitions may or may not relate to one factual incident.

One entry is made on line 1 for every petition which leads to one of the results listed in lines 5 and following. Unless a petition results in a hearing, it is not listed in the tabulation in line 1. However, each time a particular petition results in a hearing, a separate entry is made in line 1. For example, a single child, charged under one petition, has a detention hearing, a waiver hearing, and an adjudicatory hearing. In such a case, three entries would be made in line 1.

[2] One entry is made on line 2 each time a child is given a hearing. The child who is charged in more than one petition for separate offenses is listed only once in line 2 even though multiple petitions are filed against him. However, each time a particular child has a hearing, an additional entry is made on line 2. For example, a single child, charged under one petition, has a detention hearing, a waiver hearing, and an adjudicatory hearing. In such a case three entries would be made in line 2. Since many children are charged under more than one petition, line 1 will be greater than line 2.

[3] The specific meaning of the various types of hearings will be explained in the footnotes below. To understand the method of making entries which commence on line 5, it is necessary to explain the focus of this chart. It is designed to reveal the number and different types of actions which the masters take which lead to 1) orders signed by the judge and 2) a result which affects the juvenile in an immediate and very specific way even though the judge does not become involved through the signing of an order. Thus, the chart follows the procession of the child through the various stages of the court process, commencing with the detention hearing and ending with the disposition hearing, and records separately each court appearance in which one of the results listed in lines 5-37 is reached.

The following examples illustrate the method of making entries on the chart:

A. Single child-single petition.

— A single child charged under a single petition has a waiver hearing and jurisdiction is waived. The following entries would be made on the chart:

i) one entry on line 1.
ii) one entry on line 2.
iii) one entry on line 9.

— A single child charged under a single petition has a disposition hearing not immediately after the adjudicatory hearing, at which the master recommends committment and restitution. The following entries would be made on the chart:

i) one entry on line 1.
ii) one entry on line 2.
iii) one entry on line 35.
iv) one entry on line 36.

B. Single child-multiple petitions.

— A single child charged under three petitions has a waiver hearing on each petition and jurisdiction is waived on each petition. The following entries would be made on the chart:

i) three entries on line 1.
ii) one entry on line 2.
iii) one entry on line 9.

— A single child charged under five petitions has an adjudicatory hearing in which two of the petitions are dismissed by the State's Attorney, the third petition is dismissed because the delinquent act is not sustained, and the remaining two petitions result in a finding that the child committed the delinquent acts. A disposition hearing is held immediately thereafter, and probation to the Department of Juvenile Services and restitution is recommended. The following entries would be made on the chart:

i) five entries on line 1.
ii) one entry on line 2.
iii) one entry on line 16.
iv) one entry on line 18.
v) one entry on line 26.
vi) one entry on line 29.

[4] A detention hearing is a hearing held pursuant to Ann. Code of Md., Cts. Art., § 3-823 and Rule 909, Md. R. of P., at which a judge or master determines whether or not the child should be detained in a training school or shelter care facility or returned to his home, pending further hearings in his case.

[5] A waiver hearing is a hearing held pursuant to Ann. Code of Md., Cts. Art., § 3-823 and Rule 911, Md. R. of P., at which the juvenile court judge or master determines whether or not the child should remain within the jurisdiction of the juvenile court for trial or be transferred to the Criminal Court for trial under procedures and with sanctions that apply to adults charged with crime. If the master or judge concludes that the child should not be waived, a further decision is made whether he should be detained or released to his family pending trial on the merits.

[6] The adjudicatory hearing is a hearing held pursuant to Ann. Code of Md., Cts. Art., § 3-829 (a) and Rule 912, Md. R. of P., at which the judge or master determines whether or not the child has committed the delinquent act charged in the petition. In some cases, the child decides to admit the charge (the functional equivalent of a guilty plea) at the commencement of the adjudicatory hearing. He may similarly admit at a pre-adjudicatory hearing called for the purposes of arraigning him or to determine whether or not he should be detained pending his adjudicatory hearing. Where such admissions were made, those cases were included in the category of adjudicatory hearings and then classified in the appropriate sub-category.

[7] This category includes those cases in which the matter was called for hearing on the merits (i.e. adjudicatory hearing) and the State's Attorney then proceeded to dismiss the case.

[8] This category includes those cases in which the matter was called for an adjudicatory hearing and where the master or judge, either prior to the taking of any testimony or prior to the conclusion of testimony, dismissed the petition on his own initiative rather than on the initiative of the State's Attorney.

[9] This category includes those cases in which the master or judge, after the presentation of testimony at an adjudicatory hearing, concludes that the delinquent act was not sustained (the functional equivalent of a not guilty finding).

[10] This category includes those cases in which the judge or master determines that the child committed the delinquent act alleged in the petition but subsequently concludes that he is not a "delinquent child." The Juvenile Causes statute defines a "delinquent child" as a child "who commits a delinquent act and who requires supervision, treatment, or rehabilitation." Ann. Code of Md., Cts. Art., § 3-801 (k). Thus, a child who is not deemed to need supervision, treatment or rehabilitation may not under the law be deemed a "delinquent child" even though he has committed a "delinquent act." When the judge or master concludes that the delinquent act is sustained but the child is not a "delinquent child", he terminates the jurisdiction of the court over the child by dismissing the petition.

[11] The disposition hearing is the hearing held pursuant to Ann. Code of Md., Cts. Art., § 3-829 (b) and Rule 913, Md. R. of P., at which the judge or master determines whether the child requires supervision, treatment or rehabilitation, and, if so, what type of treatment program should be implemented in his case. The disposition hearing is a distinct and separate proceeding from the adjudicatory hearing. In some cases it commences immediately after the adjudicatory hearing is completed and in other cases it is heard several days or more after the adjudicatory hearing has been completed. Lines 25-29 categorize disposition hearings which took place immediately upon the conclusion of the adjudicatory hearing.

[12] This category includes those proceedings in which the master or judge concludes that the child or his parents should make restitution for property destroyed or stolen or medical expenses incurred as a consequence of the child's committing a delinquent act. The authority for restitution is contained in Ann. Code of Md., Cts. Art., § 3-839 and Rule 922, Md. R. of P. The matter of restitution may be considered at a separate hearing in which only the issue of restitution is considered or as part of the overall disposition hearing. Because the matter may be considered separately and in any event calls for a special order, restitution is specially categorized.

[13] The matters categorized in lines 32-37 include disposition hearings which are not held on the same day that the adjudicatory hearing is held. Normally, the time delay between the adjudicatory hearing and disposition hearing classified here would be a week or more. See fn. 11, *supra*.

PLAINTIFFS' EXHIBIT 40

HEARINGS IN DELINQUENCY CASES BEFORE THE JUDGE, CIRCUIT COURT OF BALTIMORE CITY, DIVISION FOR JUVENILE CAUSES, SHOWING ORIGINAL HEARINGS AND EXCEPTION HEARINGS FOR CALENDAR YEAR 1974.

		Original Hearings	Exception Hearings	Totals
1.	Total Number of Petitions	960	373	1333
2.	Total Number of Children	502	210	712
3.	Types of Hearings and their Results			
4.	Detention Hearings			
5.	Children Detained	36	19	55
6.	Children Not Detained	8	10	18
7.	Total of lines 5 and 6	44	29	73
8.	Waiver Hearings			
9.	Children Waived	42	50	92
10.	Children Not Waived But Detained	7	4	11
11.	Children Not Waived and Not Detained	11	7	18
12.	Subcuria and Detained	1	0	1
13.	Subcuria and Not Detained	1	1	2
14.	Total of lines 9-13	62	62	124
15.	Adjudicatory Hearings			
16.	Dismissed by State's Attorney	111	14	125
17.	Dismissed by Court	6	2	8
18.	Delinquent Act Not Sustained	30	11	41
19.	Delinquent Act Sustained But No Delinquent Child	6	0	6
20.	Delinquent Act Sustained and Delinquent Child — Disposition Postponed			
21.	Child Detained Pending Disposition Hearing	48	29	77
22.	Child Not Detained Pending Disposition Hearing	46	24	70
23.	Total of Lines 16-22	247	80	327
24.	Disposition Hearings Held Immediately After Adjudicatory Hearing			
25.	Probation Ordered			
26.	To Department of Juvenile Services	14	4	18
27.	To Parent	0	0	0
28.	Commitment Ordered	27	13	40
29.	Restitution Ordered	2	2	4
30.	Total of Lines 26-29	43	19	62
31.	Disposition Hearings Not Held Immediately After Adjudicatory Hearings			
32.	Probation Ordered			
33.	To Department of Juvenile Services	67	7	74
34.	To Parent	3	0	3
35.	Commitment Ordered	63	18	81
36.	Restitution Ordered	18	3	21
37.	Subcuria	12	1	13
38.	Total of Lines 33-37	163	29	192
		559	219	778

PLAINTIFFS' EXHIBIT 41

TYPES AND NUMBERS OF ORDERS ENTERED IN DELINQUENCY CASES HEARD BEFORE THE JUDGE AND MASTERS, CIRCUIT COURT OF BALTIMORE CITY, DIVISION FOR JUVENILE CAUSES, CALENDAR YEAR 1974*

Types of Orders	*Judge*	*Master*	*Total*
Orders Flowing From Delinquency Hearings			
Detention Hearings			
Children Detained	36	1261	1297
Waiver Hearings			
Children Waived	42	234	276
Children Not Waived but detained	7	40	47
Sub curia and Detained	1	35	36
Adjudicatory Hearings			
Delinquent Act Not Sustained	30	484	514
Delinquent Act Sustained — Child Detained pending disposition hearing	48	546	594
Disposition Harings			
Delinquent Act Sustained			
Probation to Department of Juvenile Services	81	1796	1877
Probation to Parent	3	191	194
Commitment Ordered	90	1163	1253
Restitution Ordered	20	357	377
Total	358	6107	6465
Other			
Dismissals from Probation			2007
Termination of After-care supervision			689
Rescission of Committment to Institution			
Without after-care supervision			150
With after-care supervision			531
Total			3377
Grand Total			9842

* Orders issuing from Exception Hearings before the judge are not counted on this table in determining the number of orders. When an exception is taken from the Master's

PLAINTIFFS' EXHIBIT 42

TYPES AND NUMBERS OF DECISIONS MADE IN DELINQUENCY HEARINGS BY THE MASTERS, CIRCUIT COURT OF BALTIMORE CITY, DIVISION FOR JUVENILE CAUSES, CALENDAR YEAR 1974, IN WHICH CUSTODY OF AND JURISDICTION OVER THE CHILD IS AFFECTED AND IN WHICH THERE IS NO REVIEW BY THE JUDGE.

Type of Decision	*Number*
Detention Hearings	
Children Not Detained	652
Waiver Hearings	
Children Not Waived and Not Detained	46
Sub curia and not detained	13
Adjudicatory Hearings	
Dismissed by the Court	228
Delinquent Act Sustained but No Delinquent Child	187
Delinquent Act Sustained — Child Not Detained Pending Disposition Hearing	1122
Total	2248

recommendation, the Judge does not sign an order until the exception hearing is held and a final decision is made therein. However, in gathering the data for the Masters' chart, there was no way to determine the number of times exceptions were taken to their decisions. Their recommendations were recorded regardless of whether or not an exception was eventually taken. Thus, data on this table would be inflated by including orders issuing from the Judge's exception hearings. To offset this inflation, the orders issuing from these exception hearings are not included in this table. The two totals, the number of Masters' recommendations to which exceptions were taken and the number of orders issuing from exception hearings, are approximately equal for any calendar year.

PLAINTIFFS' EXHIBIT 46
(T. 14, 23-25, 49-51, 60-62, 87-88, 90-91)

MICHAEL JOHNSON,

was called as a witness on behalf of the State, and after having been first duly sworn according to law, was examined and testified as follows:

* * * * * *

By Mr. Posner:

Q. Now, you said that was the date that Philip broke into the house. Did you know he broke into the house? A. Yes.

Q. How did you know that? A. He told me.

Q. When did he tell you, that evening? A. About 6:00 o'clock.

Q. I thought you said it was about 8:00 o'clock. A. I said that's when he told me, about 6:00 o'clock.

(The Court) What you're saying is that he told you that he broke into the house of Mr. Chambers before you saw him with the bicycle; is that what you're saying?

(The Witness) He told me — well, they wanted me to go with them.

(The Court) Before they broke in?

(The Witness) Uh-huh.

(The Court) And you said no?

(The Witness) Right.

(The Court) And you testified earlier about him wanting you to go, but that was — you're saying this happened before the house was broken into?

(The Witness) Uh-huh.

(The Court) This was about 6:00 o'clock?

(The Witness) Uh-huh.

(The Court) And it was about 8:00 o'clock or 8:30 that you saw him on the bicycle?

(The Witness) Right.

(The Court) And he said he got it from Mr. Chambers' house?

(The Witness) Uh-huh.

(The Court) At 6:00 o'clock, did he tell you that he was going to break in, or he had broken in?

(The Witness) He told me he was going to.

(The Court) And wanted you to join him?

(The Witness) Right.

(The Court) Was it just Philip that asked you?

(The Witness) Uh-uh, about three other boys.

(The Court) And Philip was one of those?

(The Witness) Uh-huh.

(The Court) And you said, no?

(The Witness) Uh-huh.

(The Court) What did they say after you said no?

(The Witness) They didn't say nothing. I just walked away.

* * * * * *

(The Witness) The defendant, Witherspoon, told me that on the night in question himself, in company with a friend, and he described him as Mikey, Michael Harris, and Roland Lofton, who are also co-defendants and have been charged, approached the rear door of 5109 Pembridge Avenue. He stated that Michael Harris broke the window, reached in and opened up the door, at which time Roland Lofton, Michael and Philip entered the house, and Philip helped carry one of the bicycles out of the house, and they all rode together, down out of the alley, and down Pembridge Avenue to the rear of their house, and they put the stuff in the house, and—

(The Court) The stuff, you mean the bicycles?

(The Witness) The bicycles. I believe they had a coat at that time. Then he said that Mikey and Roland still went back several times and removed additional property. He stated he wasn't, didn't go back the other times.

(The Court) He says he just went in the one time?

(The Witness) The first time, when the entrance was made.

By Mr. Katz:

Q. Did he give you any information as to where this property would be that he had taken out? A. He said it was in the basement at that time.

Q. Basement of— A. Of his house. The night of the burglary, he stated that.

Q. Where does Philip live? A. 5110 Pembridge Avenue, directly across the street from the victim.

Q. And acting on that information, what did you find? A. There was no — well, I spoke to Ms. Witherspoon again, and got her permission to look in her basement. She accompanied me to look in the basement, and we found no property.

* * * * * *

(Mr. Posner) All right, sir. And getting to Detective Barger, I again, I feel very strongly that the statement of rights is defective, for the reason that by Detective Barger's own statement, that one, there was some confusion in Philip's own mind as to whether or not he wanted a lawyer at that point, which is freely acknowledged in the testimony by the Detective, and the boy then at first writes yes, and then upon a further questioning by — or asked him another question evidently, obviously to clear it up, and Detective Barger says he then scratched it out and wrote, no, if Your Honor please, and I also understand that the boy's mother was there. Unfortunately, I have been trying to get her here today, and she's working, and unable to be

here. The sister tried to reach her, and evidently was unable to.

(The Court) The mother is not here today?

(Mr. Posner) The sister is here, but not the mother.

(The Court) The sister of the respondent or of the mother?

(Mr. Posner) The sister of the respondent is here.

(The Court) Of course, I was unaware of that. You never made any request for postponement of the case for purposes of getting the mother here—

(Mr. Posner) Well—

(The Court) I noticed a lady in the Courtroom, and I just assumed it was the mother.

(Mr. Posner) I am going to request that the matter be continued so that we can get the mother in here, if Your Honor please, even if it's later this afternoon or tomorrow.

(The Court) The motion is denied. It's very untimely.

* * * * * *

(The Court) Philip, do you want to stand, please? Philip, I am going to find you delinquent in this petition for the reasons stated in the petition, which means, in fact, that I am finding you guilty of this charge against you.

* * * * * *

But Michael Johnson very directly pointed a finger at you. Michael Johnson testified that at 6:00 o'clock that evening you and three other boys approached him and asked him to participate with you in the breaking and entering of Mr. Chambers' home; that you discussed it with him and asked him to participate, and that he said no. He was not going to, and then at about 8:00 or 8:30, he saw you in the alley behind Mr. Chambers' home, four doors from the home, riding a ten-speed bicycle.

Michael testified, and without contradiction from you, that you never had a bicycle, and he knew you well, and that you told him that you took it out of the house next to Mr. Boser, which is 5109 Pembridge. That's where you got it; that you had it with you. Quite frankly, I believe totally the testimony of Michael Johnson.* * *

* * * * * *

The testimony of Detective Barger was that you admitted to doing this, that you admitted that with three other boys you broke in and that you took the bicycle yourself. You didn't go back another time as the others did, but that you were part and parcel of this. You admitted that you told that to the detective. You admitted that you said that, but you're saying it wasn't the truth. That the only reason you said that to Detective Barger is — was because Detective Barger told you that if you would admit that you did it, he would let you go, and you could go back to school. Yet you admitted on cross examination that it wasn't even a school day. There was no school to go back to, at least that day, and your testimony I just don't believe, and I want to make it very clear that even if there was no statement given by you to Detective Barger, even if that was not an issue at all, I would still find you delinquent. I would still find you guilty. I would find you guilty and delinquent on the basis of Michael Johnson's testimony. To me that is wholly sufficient, and I wholly believe it. I want to make that very clear.

* * * * * *

PLAINTIFFS' EXHIBIT 49
(Pp. 1, 2, 4, 5)

The following attachments contain information relating to the delinquency hearings before the Masters assigned by the Circuit Court of Baltimore City, Division for Juvenile Causes, of the plaintiffs in *Donald Brady, et al. v. William Swisher, et al.*, Civil Action No. T 74-1291, and the petitioners in *Andre Aldridge, et al. v. James Dean, et al.*, Civil Action Nos. T-74-1300-1308.

Each attachment relates to a separate hearing and each contains the following information:

1) Name of the child who was the respondent in the delinquency hearing;

2) Petition number under which the child was charged;

3) Recitation of the charge contained on the petition;

4) Witnesses testifying at each hearing;

5) Summary of the substance of each witness' testimony;

6) Finding of the Master;

7) Basis for the Master's finding;

8) Name of the Assistant State's Attorney who represented the petitioner;

9) The basis for the exception taken by the Assistant State's Attorney.

The attachments are not intended as nor are they in fact transcripts of what took place at the hearings. Thus, the summary of the substance of the witnesses' testimony is not a verbatim copy of what each witness said at the hearing. However, the summaries are a complete and accurate reflection of the essence of this testimony. Similarly, the finding of the Master and the basis for it are not exact records of what the Master actually stated at the hearing. However, they do reflect completely and accurately the substance of both the finding and its basis. Finally, the basis for the exception taken by the Assistant State's Attorney is not an exact record of what the Assistant State's Attorney may have stated when he filed the exception. However, it does reflect accurately and completely the substance of his reasons for taking the exception.

The information was compiled from the following sources:

1) The petition filed in each case;

2) Notes of the Masters hearing each case of what took place at each hearing and/or conversations with these Masters;

3) Conversations with the Assistant State's Attorneys involved in each case;

4) Conversations with the defense counsel involved in each case.

* * * * * *

In the
Circuit Court of Baltimore City,
Division for Juvenile Causes

Petition No. 014287

In the Matter of
Phillip Witherspoon

---

1) *Hearing Date*: June 4, 1974 *Before*: Master Paul Smith

2) *Charge:* On or about January 23, 1974 Phillip Witherspoon unlawfully did break and enter the dwelling house of Michael Chambers located at 5109 Pembridge Avenue in the nighttime, with the intent to steal, take and carry away the goods, chattels, monies and properties of Michael Chambers of the value of $1514.90.

3) *Witnesses testifying at the hearing and the substance of their testimony*:

a) Victim — Michael Chambers

Mr. Chambers testified that he returned home on January 23, 1974 to discover that various pieces of his property were missing.

b) Arresting Officer — Police Agent Greenwald

Agent Greenwald testified that he and Detective Barger spoke with Phillip and his mother at the police station and advised them of their rights to have an attorney.

c) Mother of Respondent — Mrs. Elsie Witherspoon

Mrs. Witherspoon testified that she did not understand the waiver form her son signed nor the explanation the police gave. She also testified that she was at home at the time of the break-in with her son, but that she saw nothing.

d) Respondent did not testify

4) *The Master's finding and the basis for it*:

Master Smith found the delinquent act not to be sustained in this case. He was influenced in his decision by the question of whether or not the respondent had made a waiver of counsel intelligently.

5) *Assistant State's Attorney and the basis for his filing an exception:*

Assistant State's Attorney Dana Levitz filed an exception to the Master's finding that the delinquent act not be sustained because there was no showing made that the waiver of counsel was not intelligently made since respondent did not testify. While the mother may have been confused, this did not mean that her son was also when he signed the waiver.

JOINT STIPULATIONS OF FACTS
PAUL SMITH

Counsel for the parties in the above entitled case stipulate that Paul A. Smith, if called as a witness, would give the following testimony:

1) He is a master in chancery in the Circuit Court of Baltimore City, Division for Juvenile Causes, and has held that position since June, 1971.

2) He had recent occasion to thoroughly examine the testimony he gave on March 18, 1975 in the case of *Brady, et al. v. Swisher, et al.*, and *Aldridge, et al. v. Dean, et al.* In connection with this recent examination of his testimony, he has considered what parts of his testimony would not be the same if he were answering the same questions today. Based on that examination he would make the following nine modifications or additions to that testimony.

First, the employment qualifications for a master assigned to the Juvenile Causes Division are now governed by Ann. Code of Md., Cts. & Jud. Proc. Art., §§ 3-813 and 3-803. See Tr. 226-27.

Second, the duties of the juvenile court master have remained the same except masters no longer hear waiver cases, pursuant to policy of the juvenile court judge. See Tr. 227-28.

Third, normal procedure at present is to advise the child of the right to file an exception after the disposition hearing rather than after the adjudicatory hearing. See Tr. 235-36.

Fourth, in a case in which his finding is "act not sustained", the action he would take with respect to advising the child or his family of the right of the State to take an exception is not uniform; sometimes he advises the respondent of the State's right to take an exception and sometimes he does not. See Tr. 236-37.

Fifth, all orders in cases before him are now prepared by the clerk's office for the judge to sign. See Tr. 239.

Sixth, the only circumstance in which he now sends to the juvenile court judge a memorandum describing his recommended action in a detention hearing is when he recommends that the child be sent to the Maryland Children's Center for diagnostic evaluation. See Tr. 239-40.

Seventh, under statute and court rule in effect since July 1, 1975, a child may be detained no longer than

one court day prior to being brought before a juvenile court judge or master. See Tr. 242.

Eighth, since the summer of 1975, when the present juvenile court judge began sitting in the juvenile court, he has on no occasion discussed with that judge any case before him. See Tr. 254.

Ninth, the juvenile court judge now signs an order if the child is found non-delinquent. See Tr. 263.

3) There are three circumstances in which he normally prepares a memorandum to the juvenile court judge setting forth his findings and recommendations:

a) when recommending commitment;

b) when recommending diagnostic evaluation at the Maryland Children's Center; and

c) when the parties to the proceeding have declined to sign a waiver of their right to receive such a memorandum. See Plaintiff's exhibit 63. In cases in which he finds the child is not delinquent, or cases in which he finds the child is delinquent, but recommends probation, a memorandum is forwarded to the judge only where parties do not sign a waiver form. It is very rare that parties do not execute a waiver form.

4) Since July 1975 the proceedings in his courtroom has been recorded by a tape recorder utilizing four microphones. The recording of proceedings has the effect of making them more complete, thorough, and formal, and causes the proceedings to appear more like a full trial than was the case prior to July, 1975.

STIPULATION

HONORABLE ROBERT KARWACKI

The Plaintiffs, by their attorneys, Peter S. Smith, Phillip G. Dantes, and Michael S. Elder and the Defendants, by their attorneys, Francis B. Burch, Attorney General of Maryland, and Bernard A. Raum, Assistant Attorney General of Maryland, do hereby stipulate that if the Honorable Robert L. Karwacki,

Associate Judge, Supreme Bench of Baltimore City, presiding as Juvenile Court Judge, were called to testify in the above captioned case, his testimony would be as follows:

1. That comparing the case load in Baltimore City Juvenile Court as of today with the case load as it existed prior to August, 1975, the current figures indicate that the court is receiving about 900 petitions per month, alleging delinquency, as compared to approximately 1,300 petitions per month prior to August, 1975.

2. That as presiding Judge of the Juvenile Court he hears all petitions for waiver of jurisdiction of the court originally. Secondly, he hears all exceptions to recommended findings by the Masters, both on the issue of adjudication and disposition, as well as on the issue of detention. In addition, he would normally hear originally the more aggravated type of case, such as murder, rape, or armed robbery, where those charges are within the jurisdiction of this Court under the provisions of the Code. Also, he hears originally all cases wherein the respondent is represented by the Juvenile Law Clinic. In explanation of that procedure, inasmuch as the students who practice as part of that clinic under the supervision of Mr. Smith and Mr. Dantes practice pursuant to Rule 18 of the Rules applicable to admission to the Maryland Bar, he feels a personal responsibility to monitor their performance.

3. That his Court also has jurisdiction under the Juvenile Causes Act over petitions alleging that a child is in need of supervision and that a child is in need of assistance of the Court. These non-delinquency petitions, which represent a small portion of the total case load of this Court, sometimes involve detailed hearings. For specific figures, he would refer to the office statistics. He would estimate that approximately ¾ of a day per week of his time is personally taken up by hearing some of these cases originally and hearing exceptions from Master's recommendations in other

cases, as well as by considering reports with regard to review of commitments and placement of these children who have previously been before the Court on such petitions.

4. That he spends approximately ten hours per day in the Courthouse. Of that ten hours, he would estimate that he spends approximately 6-6½ hours engaged in matters in Court or Chambers related to hearings. The balance of the time is spent reviewing recommendations of the Masters and in conferring with the Masters and in the general administrative duties related to his position as the head of the Juvenile Court System in Baltimore City, which of course is assisted by seven Masters in the performance of its duties.

5. That according to the statistics which were furnished in August of 1975 when he assumed his duties as the presiding Judge in the Juvenile Court in Baltimore City, (these figures being supplied by the Administrative Office of the Courts and being compiled by the State Computer) there were outstanding approximately 6,000 petitions which were untried as of that date. The most current report from the Administrative Office of the Courts, covering the period through March of 1976, showed that at the end of that period there were pending 674 petitions. This would include both delinquency and non-delinquency petitions. As a practical matter, there is no backlog in the Juvenile Court of Baltimore City. On the average the Court is able to afford a child charged in a delinquency case, or where a child who is brought before the Court alleged to be in need of supervision or in need of assistance, a hearing within 6 weeks of arrest and within two or three weeks of a petition being filed with the Court. The figure just given of 674, of course, indicates that there is no backlog at the present time. Because of what was said earlier about 900 petitions being filed in the delinquency area alone each month, and approximately another 100 filed in the non-delinquency area, the Court will never be able to reduce an existing backlog much below

the 674 figure. At this point it is his judgment that there is no backlog of cases in the Juvenile Court System.

6. That the reduction in case load can be accounted for in a few ways. First, by hearing all waiver petitions originally the Court has drastically reduced what formerly was the largest number of exceptions taken from waiver recommendations by Masters. The time required of Masters to hear those kinds of cases, is eliminated allowing them to devote their time to the remaining matters before the Court. Secondly, with the advent of recording of all Master's hearings, there has been a dramatic decrease in the number of exceptions filed from recommended findings of the Masters. Since August of 1975, Judge Karwacki's figures indicate that we have had 134 exceptions filed and of that number he estimates that he has sustained no more than about 15 of those exceptions. This indicates that the Masters are recommending the right results in the cases which they are hearing. Thirdly, the Court has, with the cooperation of the State's Attorney's Office of Baltimore City and the office of the Public Defender of Maryland (which represents approximately 95% of all respondents before the Court) reached an effective arraignment procedure. More children are admitting to the commission of a delinquent act at the time of their original appearance in Court and thereby rendering further appearances in Court unnecessary and further hearings into adjudication of the delinquency unnecessary. Respondents are represented by the Public Defender's Office or private counsel unless the Master or Judge determines that they have waived counsel.

7. That until about six weeks ago, the Juvenile Judge was receiving exceptions to both adjudicatory hearings and recommended findings therefrom, as well as recommended findings from dispositional hearings. As of that time, Judge Karwacki has started the practice of refusing to accept an exception to a recommended finding after an adjudicatory hearing until such time as the Master completes his disposition hearing and also enters a recommended finding as to

disposition. Of course, at any time the Court will hear a recommended order with regard to detention or an exception from a detention order entered by a Master. That is always immediately heard by the Court and at the present time the Judge is hearing them on the same day that the recommendation of detention is made. And, as long as the case load remains manageable as it is right now, that will continue to be done.

8. That the rules require that whenever a Master holds an adjudicatory hearing and a dispositional hearing that he must submit the case to the Judge for order accompanied by a memorandum of his proposed findings and a recommendation by him based on the record. In the great majority of all recommended findings by the Masters, the respondent, counsel for the respondent and the respondent's parents or guardian, indicate at the time of the hearing before the Master that they are satisfied with the reasons given by the Master on the record for his recommended findings of facts and conclusions of law. A written waiver of the rules requirement that a written memorandum be prepared is executed by the respondent and counsel and his parent or guardian. The form used for this purpose has been introduced in this proceeding as Plaintiff's Exhibit No. 63. Judge Karwacki, therefore, receives a small percentage of memorandum pursuant to the rule in the many cases which flow through the Masters. He insists, however, that notwithstanding a waiver, that if any commitment and or detention is ordered by the Master that a written memorandum outlining the Master's findings of facts and conclusions of law accompany his recommended disposition of the case where either commitment or detention is indicated. In the last month, the Judge's statistics indicate that there were 75 such memoranda submitted to him for review. In those cases, those memoranda are reviewed, the soundness of the recommended findings of fact and conclusions of law are analyzed, and where Judge Karwacki feels the need, although this is done very

infrequently, he actually will review a tape of the proceedings prior to signing a recommended order.

9. That as much time as is required is given to the consideration of each individual case as it is presented to Judge Karwacki. He estimates the minimum time would be 15 to 20 minutes, although he has spent as much as two and three hours on one memorandum. As already indicated, he reviews about 75 of these memorandum per month.

10. That there have been exceptions taken specifically by the State since August of 1975 in which the question of double jeopardy had been raised. The actual number which actually proceeded to a hearing is two or three. In each of those cases, Judge Karwacki has, in following the Court of Appeals decision in the matter of *Anderson,* ruled that the respondent has not been placed in double jeopardy by having the exception reheard before him. In two of the three, if his recollection serves him correctly, Judge Karwacki agreed with the Master below. In the third, which was an exception from a disposition of a Master who had recommended probation and where the Judge committed the child to a training school, he in effect granted the exception. The Judge believes no appeal has been taken from that action.

11. That, while the judge and masters do not discuss a specific case in regard to adjudication or dispositions, there is nonetheless a continuing dialogue between the judge and masters as to matters coming before the court in regard to procedure, treatment and other matters which could affect children before the court. Additionally, the judge meets with the masters each Wednesday at which time questions are raised respecting situations and issues in concluded cases which have been raised in memoranda previously submitted to him. The cases and memoranda are not identified specifically. However, there is general discussion regarding why certain determinations and dispositions (including referrals for diagnostic evaluation) were made under the given circumstances.

12. That Judge Karwacki is familiar with *Aldridge v. Dean* and was very much aware of it as he prepared to undertake the assignment of the Juvenile Judge of Baltimore City. He believes that by requiring the recording of all proceedings in Juvenile matters before the Masters, that by providing additional personnel in the offices of the State's Attorney of Baltimore City, the office of the Public Defender to handle the case load, by requiring the reports of recommendations of Masters in the cases heard by them where the same is not waived by the parties, their counsel and their parents, that the State has provided a system which is now working. The Juvenile Court is in a position to provide persons charged under the Juvenile Causes Act with delinquency, as well as in non-delinquent matters, with prompt hearings, full hearings and adequate review by the Court. The Judge feels that the changes which have been effected since July of 1975 are in part a reaction to *Aldridge* and, in his opinion, are a good faith attempt by the State to remedy some of the problems which the U.S. District Court recognized in deciding *Aldridge v. Dean.*

13. That at the recent Maryland Judicial Conference the committee on Juvenile and Family Law and Procedure, of which Judge Karwacki is a member, had occasion to submit a report and recommendation to that conference. The report was adopted by the Conference on April 24, 1976 when meeting in business session. The report speaks for itself.

JOINT STIPULATIONS OF FACT
LEONARD BRISCOE, THEODORE HAYES JOHN O'GRADY, BERNARD, AND BRIGHT WALKER

I. Leonard Briscoe, Theodore Hayes, John O'Grady, Bernard Peter and Bright Walker, if called as witnesses, would give the following testimony:

A. They are masters in the Circuit Court of Baltimore City, Division for Juvenile Causes (Juvenile Court) and have occupied those positions since October,

1975, December, 1969, January, 1964, June, 1971, and June, 1971, respectively.

B. They have never discussed with the present judge of the juvenile court any facts or circumstances pertaining to any case assigned to them for a delinquency adjudicatory or disposition hearing during the time such case was pending before them or was pending before the judge following their submission to the judge of their findings, conclusions, and recommendations. They have not discussed with the present judge of the juvenile court any items in any memoranda prepared by them for the judge setting forth findings, conclusions, and recommendations in any cases heard by them.

C. However, while the judge and masters do not discuss a specific case in regard to adjudication or dispositions, there is nonetheless a continuing dialogue between the judge and masters as to matters coming before the court in regard to procedure, treatment and other matters which could affect children before the court. Additionally, the judge meets with the masters each Wednesday at which time questions are raised respecting situations and issues in concluded cases which had been raised in memoranda previously submitted to him. The cases and memoranda are not identified specifically. However, there is general discussion regarding why certain determinations and dispositions (including referrals for diagnostic evaluation) were made under the circumstances.

II. Leonard Briscoe, Theodore Hayes and Bright Walker would further testify that they do not prepare written memoranda for the juvenile court judge in cases in which they recommend that a child be detained pending an adjudicatory or waiver hearing, except when they recommend detention for purposes of a diagnostic evaluation at the Maryland Children's Center.

JOINT STIPULATIONS OF FACTS

HOWARD GOLDEN

* * * * * *

Counsel for the parties in the above entitled case stipulate that Howard Golden, if called as a witness, would give the following testimony:

1) He is a Master in Chancery, Circuit Court of Baltimore City, Division for Juvenile Causes, Baltimore City. As a master since July 2, 1975, he has handled a full-time docket of delinquency and non-delinquency arraignments, adjudications, and dispositions. He received his college degree from the University of Maryland in 1964 and his law degree from the University of Maryland in 1967. After passing the bar in the summer of 1967, he went into private practice. In February of 1972, he became an assistant public defender for the City of Baltimore, and was immediately assigned to Juvenile Court. In September 1972 he became Deputy Chief of the Juvenile Section of the Office of Public Defender for Baltimore City. He remained in that position until July 1975 when he assumed his present position.

2. While working as an assistant public defender, he represented juveniles in delinquency adjudicatory hearings before all the masters, namely Theodore Hayes, John O'Grady, Bright Walker, Avrim Rifman, Bernard McDermott, Bernard Peter and Paul Smith. Five of those seven are presently masters. Master McDermott died in April, 1975 and was succeeded by Master Golden. Master Rifman retired in October, 1975 and was succeeded by Master Briscoe.

3. He has recently read the testimony of Master Paul Smith presented in *Brady v. Swisher* and *Aldridge v. Dean* on March 18, 1975. The testimony given by Master Smith beginning with the words "The delinquency cases" on p. 230 and ending with the words "to be sustained" on p. 231 is an accurate description of how the other six masters he observed in his capacity as public defender conducted their hearings.

4. He has recently read the written stipulation of Master Smith's testimony in which Master Smith makes certain modifications and additions to the testimony Master Smith gave last March. If he were asked the same questions that Master Smith was asked on March 18, 1975, his responses would differ from Master Smith's responses, as modified and added to by Master Smith's written stipulation of testimony, in the following eight respects only:

First, there are times when his secretary will type proposed orders when the printed orders are not adequate.

Second, in one instance since he became a master, he has discussed with the juvenile court judge a case pending before him (Master Golden). In that instance the facts of the child's adjudication and disposition were not discussed. The discussion was limited to whether or not the juvenile court has the power to compel two state juvenile agencies to jointly contribute to the support of a child.

Third, as a matter of personal practice, he does not inform respondents of their right to take an exception to the master's findings nor does he inform them of the State's right to take an exception.

Fourth, he takes very scanty notes on the back of the petition. He takes more copious notes on legal pads but they are normally discarded after the hearing. He considers that his notes are for his use only.

Fifth, his memoranda which he forwards to the juvenile court judge are not as detailed as those described by Master Smith at pages 240-41 of the March 18, 1975 transcript. Since he does not include in his memoranda to the judge any specifics pertaining to the crime itself, he does not believe that the judge, based on a reading of these memoranda, could have any understanding of the nature or amount of evidence present at the hearing.

Sixth, he does not believe that the 30 day detention period provided by law may be extended in the absence

of the respondent waiving his objections to such an extension.

Seventh, if he finds the child not delinquent and the State excepts to his decision of non-delinquency, he would not hold a new detention hearing to extend detention pending the exception hearing before the judge; however, if the original thirty day detention period had not expired, he would hold a hearing to determine whether the child who he found non-delinquent should complete the original detention period of thirty days.

Eighth, he finds the act to be sustained and recommends that the child be found not delinquent in a substantially higher percentage of cases than does Master Smith.

5. There has never been an occasion since he has been a master when the juvenile court judge has sought to discuss with him a case assigned to him.

6. In his role as a public defender appearing before all masters and in his role as a master he has observed that the master is normally addressed by the respondent and his parents as "Judge", "Your Honor", "Mister" or "Master". Furthermore, attorneys address him in those various ways.

7. In both his capacity as a public defender and juvenile master, he has observed reactions similar to those set forth by Master Smith at pages 258-59 of the transcript of March 18, 1975. He has frequently heard statements from respondent and his family at the conclusion of the master's adjudicatory hearing that they were relieved that the trial was over.

8. In his capacity as assistant public defender, he discussed with respondents and their parents the fact that the State was taking an exception to a finding of non-delinquency in the respondent's case. He also represented respondents in the exception hearing before the juvenile court judge. In such situations he frequently had great difficulty in explaining to the parents' and the child's satisfaction why the child must

be retried. In referring to the master's adjudicatory hearing, parents complained to him that their child had already been found not guilty before the "judge".

9. The proceedings heard by him in his capacity as master are recorded on a tape recorder. When he appeared before masters in his capacity as assistant public defender, the proceedings were not recorded. The effect on the proceedings of the tape recording is to make him more conscious of making a record that might be viewed. He more carefully follows all the rules of evidence, and the effect is to give the trials in his courtroom a more formal flavor. He is constantly telling the respondent to speak up, thereby making the child even more aware of the recording.

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Harrison L. Winter, United States Circuit Judge, the Honorable Edward S. Northrop, United States District Chief Judge, and the Honorable Joseph H. Young, United States District Judge, filed September 16, 1977 in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge, or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge.

2. That defendants, their agents, employees, persons acting in concert with them, and their successors in office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

Dated at Baltimore, Maryland this 19th day of September, 1977.

Signatures Omitted

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-653

WILLIAM SWISHER, et al.,

Appellants

v.

DONALD BRADY, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO PROCEED IN FORMA PAUPERIS

Appellees move this Court, pursuant to Rule 53 of the Rules of this Court, for an Order permitting them to proceed in forma pauperis for purposes of filing the attached Motion To Affirm and for all other purposes should this Court set this case down for plenary consideration. In support of this Motion appellees allege the following:

1. At the time appellees instituted this suit in the court below, they applied for and were granted permission to proceed in forma pauperis.

2. Neither appellees nor their families are able to pay for the cost of this appeal and still provide themselves with the necessities of life.

3. Counsel for appellees has been and will continue to represent them without fee.

In further support of this Motion there is attached an affidavit from appellees' counsel and copies of affidavits submitted in support of Motion to Proceed In Forma Pauperis in the court below.

WHEREFORE, it is respectfully requested that the Motion to Proceed in Forma Pauperis be granted.

WHEREFORE, it is respectfully requested that the Motion to Proceed in Forma Pauperis be granted.

Peter S. Smith
Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201
Counsel for appellees

AFFIDAVIT

Peter S. Smith being first duly sworn, according to law, states the following:

1. I am an attorney at law and am currently employed as a Professor of Law at the University of Maryland School of Law, Baltimore, Maryland. I am a member in good standing of the Bar of this Court.

2. I am counsel for Donald Brady, Michael A. Epps, James Oliver Love, Phillip Witherspoon, William Beckett, William Campbell, Andre Aldridge, George McLean and Clinton Stewart, who are the appellees in No. 77-653 . I have represented the appellees since the inception of this litigation in the United States District Court for the District of Maryland and am receiving no fee for my services.

3. Because of the financial inability of either the appellees or their parents or guardians to pay any of the fees and costs in connection with this litigation, I submitted to the District Court at the commencement of the litigation, a Motion to Proceed in Forma Pauperis and affidavits executed either by the appellees or their parents or guardians. The Court below granted the Motion to Proceed in Forma Pauperis.

4. To the best of my knowledge and belief, appellees' and their families' financial condition has not sufficiently changed during the course of this litigation to enable them to pay fees and costs. Because many of the appellees and their parents or guardians have no telephones, move with some frequency, and are not readily available for consultation with their counsel, the execution of a new set of affidavits to accompany the attached Motion to Proceed in Forma Pauperis would create significant difficulties for appellees' counsel.

Peter S. Smith

SUBSCRIBED and SWORN to this day of November, 1977.

Notary Public

AFFIDAVIT OF INDIGENCY

DONALD BRADY, first being sworn, deposes and says:

I am a resident of Baltimore City. I am eighteen (18) years of age. I live at home with my mother. I am currently unemployed. I cannot pay the costs of this proceeding and still provide myself or my family with the necessities of life.

Donald Brady
Donald Brady

Subscribed and sworn to this 22nd day of November 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

MICHAEL A. EPPS, first being sworn, deposes and says:

I am a resident of Baltimore City. I am currently unemployed. I live at home with my mother. I cannot pay the costs of this proceeding and still provide myself or my family with the necessities of life. I am eighteen (18) years of age.

Michael A. Epps
Michael A. Epps

Subscribed and sworn to this 20th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

JOYCE LOVE, mother of James Oliver Love, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Provident Health Center, 907 Edmondson Avenue, Baltimore, Maryland. My net income is approximately $110.00 per week. I have five children and I am the sole means of support for my children and me. My son, James Love, Jr., is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Joyce Love
Joyce Love

Subscribed and sworn to this 19th day of November, 1974.

Shirley M. Agnelt
Notary Public

AFFIDAVIT OF INDIGENCY

ELSIE WITHERSPOON, mother of Phillip Witherspoon, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Hedwin Corporation, 1600 Roland Heights Avenue, Baltimore, Maryland. My net income is approximately $84.00 per week. I have three children and I am the sole means of support for my children and me. My son, Phillip Witherspoon, is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Elsie Witherspoon
Elsie Witherspoon

Subscribed and sworn to this 19th day of November, 1974.

Shirley M. Agnelt
Notary Public

AFFIDAVIT OF INDIGENCY

WILLIAM BECKETT, stepfather of Joseph Fenwick, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at the Mace Lumber Company, 1102 N. Fremont Avenue, Baltimore, Maryland. My net income is approximately $150.00 per week. I have six children and I am the sole means of support of my children and me. My stepson, Joseph Fenwick, is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

William L. Beckett
William Beckett

Subscribed and sworn to this 22nd day of November, 1974.

Shirley M. Oppett
Notary Public

AFFIDAVIT OF INDIGENCY

WILLIAM CAMPBELL, father of William L. Campbell being first sworn, deposes and says:

I am a resident of Baltimore City. I work at the Ingleside Plumbing and Heating Company, Inc., 1700 Friendship Street, Baltimore, Maryland. My net income is approximately $120.00 per week. I have five children and I am the sole means of support for myself, my wife and my children. My son William L. Campbell is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

William S. Campbell
William Campbell

Subscribed and sworn to this 20th day of November, 1974.

Shirley M. Oppett
Notary Public

AFFIDAVIT OF INDIGENCY

Ruth Kent, mother of Andre Aldridge, first being sworn, deposes and says:

I am a resident of Baltimore City. I work at School No. 27 200 S. Chester Street, Baltimore, Maryland. My net income is approximately $66.00 per week. I have three children and I am the sole means of support of my children and me. My son, Andre Aldridge is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Ruth Kent
Ruth Kent

Subscribed and sworn to this 19th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

MINNIE JOHNSON, mother of George McLean, first being sworn, deposes and says:

I am a resident of Baltimore City. I am unemployed. My net income is approximately $100 per week from the Department of Social Services of Baltimore City. I have eight children and one grandchild and I am the sole means of support for myself, my children and grandchild. My son, George McLean is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Minnie Johnson
Minnie Johnson

Subscribed and sworn to this 19th day of November, 1974.

Notary Public

AFFIDAVIT OF INDIGENCY

HAYNIE STEWART, father of Quinton R. Stewart, first being sworn, deposes and says:

I am a resident of Baltimore City. I am disabled. My wife works at Eastern Products Corp. - Subsidiary of Roper Corporation, 932 S. Snowden River Parkway, Columbia, Maryland 21046. Her net income is approximately $87.00 per week. She is the sole support of myself, and our four children. There is no other income coming in to support the family. My son, Quinton R. Stewart is not employed. I cannot pay the costs of this proceeding and still provide myself and my family with the necessities of life.

Haynie Stewart
Haynie Stewart

Subscribed and sworn to this 10th day of November, 1977.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-653

WILLIAM SWISHER, et al.,

Appellants

v.

DONALD BRADY, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Peter S. Smith

Adrienne E. Volenik

Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201

Counsel for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-653

WILLIAM SWISHER, et al.,

Appellants

v.

DONALD BRADY, et al.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court for the District of Maryland in the above entitled case be affirmed on the ground that it is manifest that the questions on which the court's decision depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment entered on September 19, 1977, pursuant to the Memorandum and Order of a District Court of three judges convened under 28 U.S.C., § 2284. The Memorandum and Order, filed on September 16, 1977, and the Judgment are included as attachments A and B, respectfully, infra.

The suit was filed on November 25, 1974 pursuant to 42 U.S.C., § 1983 alleging deprivation of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The appellees brought the action on behalf of themselves and other similarly situated persons pursuant to Rule 23, F.R. Civ. P. The thrust of appellees' complaint was that certain provisions of

rules adopted by the highest state court of Maryland and having statewide applicability denied them the right to be free of multiple prosecutions or punishments in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. In particular, appellees claimed that a court rule which permitted them to be tried again by a juvenile court judge at a de novo hearing after they had been found not guilty by a juvenile court master at a trial for precisely the same offense violated Constitutional double jeopardy protections.

Simultaneously with the filing of the § 1983 action which sought declaratory and injunctive relief, appellees filed petitions for writs of habeas corpus in the United States District Court for the District of Maryland. They allege that they had been illegally restrained of their liberty because a juvenile court judge had found them guilty and sentenced them to either probation or incarceration following de novo trials which took place because the State's attorney had excepted to the results of earlier trials in which juvenile court masters had found the appellees to be not guilty.[1] The habeas cases were filed in addition to the § 1983 case because neither action alone could obtain the full relief which the appellees desired. See Preiser v. Rodriguez, 411 U.S. 475 (1973).

1. In the cases of three of the appellees, the habeas corpus petitions were filed prior to the de novo hearings before the judge but following the filing by the State's attorney of exceptions to the juvenile court masters' determinations that the appellees were not guilty. By agreement reached between counsel and the juvenile court, the de novo hearings in those three cases were delayed pending the outcome of the federal court litigation. As a consequence of the federal court's opinion in the habeas corpus cases, the de novo hearings in those three cases never took place, and the court dismissed the habeas petitions of those three without prejudice. See Aldridge v. Dean, 395 F.Supp. 1161, 1173 (D. Md. 1975).

By agreement of the parties, the § 1983 case was held in abeyance pending the decision in the habeas corpus cases. The parties also agreed that all evidence taken in the habeas corpus cases would be included as evidence in the § 1983 case, subject to any rulings by the three-judge court respecting relevancy.[2]

Following the presentation of extensive evidence in the habeas cases, the court rendered an opinion on June 12, 1975, concluding that the de novo trial of appellees pursuant to the court rule under attack violated their double jeopardy rights. Aldridge v. Dean, 395 F.Supp. 1161 (D.Md. 1975). Appropriate orders were entered.

Appellants in the habeas cases[3] took no appeal. Instead, the Court of Appeals of Maryland, which had earlier rejected the identical claims of the unconstitutionality of the court rule, see Matter of Anderson, 272 Md. 85 (1974), cert. denied, 421 U.S. 1000 (1975), immediately proceeded to amend the offending rule.[4] As amended, the rule provided that a request by a State's attorney for a hearing before the juvenile court judge, following the master's hearing and finding of not guilty, would be restricted to a hearing on the record, unless all parties and the judge agreed to supplement the record. Presumably the Maryland Court of Appeals felt that this change would render the offending rule constitutional once again.

---

2. The three-judge court did not exclude any of the evidence that had been adduced in the habeas corpus cases. Hence the record in the instant case consists of all evidence taken in both the habeas and three-judge court cases. See the slip opinion of the court below in the instant case, at pp. 3-4.

3. In conformity with normal habeas corpus practice, the appellants in the habeas cases, unlike in the instant case, were the persons having immediate custody of appellees. The same counsel, however, (the Maryland Office of the Attorney General) has handled all of the proceedings for the defendants in the instant case and for the respondents in the habeas corpus cases.

4. The change in the rule took effect one week after the Orders in the habeas corpus cases were entered.

Appellees in the instant case then obtained leave to file a supplemental complaint in the § 1983 suit in which they noted that the offending rule had been amended, but claimed that it was still unconstitutional for the same reasons previously alleged. Appellees further alleged in the supplemental complaint that, effective the same day as the amended rule (July 1, 1975), the juvenile causes statute was amended to include a provision authorizing the State's attorney to request a de novo hearing before the juvenile court judge following a hearing before a master which resulted in a finding of not guilty. See Ann. Code of Md., Cts. & Jud. Proceed. Art., § 3-813(c). Appellees alleged that this new statutory provision violated their double jeopardy rights.[5]

Following the taking of additional evidence, designed mainly to update the record developed at the habeas corpus hearing, the court below rendered its decision, unanimously declaring the offending portions of the rule in question to be unconstitutional and enjoining the appellants from taking further action under those portions of the rule. Notice of Appeal to this Court was filed on October 14, 1977.

---

5. Prior to July 1, 1975, the unconstitutional scheme complained of had always been contained exclusively in court rules. Ironically, at the very moment the rule was changed in an effort to avoid the effects of the federal habeas corpus decision, the statute took effect authorizing the precise procedure that the habeas corpus decision declared illegal. Despite the fact that the new statute and the amended rule became effective on the same date, the parties have agreed the rule should prevail since it was approved by the Maryland Court of Appeals after the Governor of Maryland signed the bill incorporating the new statutory provision. See slip opinion of the court below at p. 7. As appellees make clear, infra, decisions of this Court require the same result whether one views the statute or the rule as controlling. In any event, not even the appellants would contend that their case is stronger under the statute than the rule. Thus, if for any reason this Court should conclude that the statute should govern rather than the rule, all of appellees' arguments, as well as the decision of the court below, would apply a fortiorari.

ARGUMENT

The decision of the district court is plainly correct; hence affirmance without plenary consideration is appropriate. Every pertinent issue in this case can be disposed of by responding to three questions: (1) Does the double jeopardy clause of the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment, apply to juvenile court proceedings? (2) If question (1) is answered in the affirmative, can the effect of that answer be avoided by providing that the second trial will be on the record? (3) If double jeopardy principles apply to juvenile court proceedings and they cannot be avoided by making the second trial on the record, does it make any difference that the first trial was held before a judicial officer who is called a master?

The first two questions have been explicitly decided in appellees' favor by decisions of this Court. Appellees acknowledge in their Jurisdictional Statement, at p. 12 , that the first question is decisively answered by Breed v. Jones, 421 U.S. 519 (1975). The second question is just as clearly answered by United States v. Jenkins, 420 U.S. 358 (1975). Indeed, Jenkins, which the Jurisdictional Statement neither cites nor discusses, almost seems to be written to deal with the very procedure that the Court of Appeals of Maryland followed when it rewrote the rule to avoid the effects of the earlier habeas corpus decision in Aldridge v. Dean, supra. As the court below noted, see slip opinion at p. 14, Jenkins explicitly ruled that the double jeopardy clause would be violated even if, at a second hearing, the trial court took no additional evidence. Unlike United States v. Wilson, 420 U.S. 332 (1975), rendered the same day as Jenkins, the hearing on the record which is the subject of the instant dispute necessarily involves the court taking action beyond mere reinstatement of the verdict of the first hearing. Thus the attempt by the Court of Appeals of Maryland in 1975 to avoid the constitutional difficulty by

restricting the second hearing to one on the record wholly fails in light of Jenkins. Moreover, as the court below noted, see slip opinion at p. 14, this Court in Breed noted that the case in the adult court, by stipulation, was submitted "on the transcript on the preliminary hearing." Breed v. Jones 421 U.S. at 525. This Court made no suggestion that double jeopardy principles had no application because Jones' second hearing was on the record.[6]

The only remaining question is whether a different result is required simply because the first hearing is held before the juvenile court master. Admittedly, this precise question has not been before this Court. Nevertheless, appellees submit that the reasoning of Breed v. Jones, although applied here in a slightly different context, so plainly requires the conclusion reached by the court below on this question as to make plenary consideration unnecessary. The whole thrust of the Breed case was to reject the notion that double jeopardy principles could be avoided by the claim that the two hearings simply constituted one continuous proceeding to which jeopardy attached only once. If such notion had no validity in the Breed case, there is no apparent reason why it should have validity simply because a master presides at one of the two hearings. The whole purpose of the extensive evidentiary hearings in the court below was to remove any doubt that the role of the master was exactly that which appears on the face of the statutory and rules provisions which speak to the duties of the master: he is a judicial officer who presides over full trials, accesses credibility of witnesses, makes findings of fact, rules on the law, and at the end of the trial announces his decision. Indeed, the only action he does not

---

6. Both Breed v. Jones and United States v. Jenkins, had already been decided when the Maryland Court of Appeals amended the de novo rule to provide hearings on the record.

take is to sign the final order.[7] The opinion of the court in the habeas cases and the decision below in the instant case confirm the accuracy of this description, and further find that the so-called "review" by the judge of the master's findings is essentially meaningless. The court below correctly concluded:

> Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and security" in a juvenile and imposes a "heavy personal strain," and the juvenile "is put to the task of marshaling his resources against those of the State." Slip opinion at pp. 8-9.

The Jurisdictional Statement is noticable in its failure to discuss the record developed below. Rather it seeks to emphasize two points: (1) the second hearing before the judge is on the record, and (2) Breed v. Jones is distinguishable because the judicial officer in the first hearing in that case had the power to enter an order whereas the judicial officer in the instant case (the master) does not.[8] As already noted, the first

---

7. Indeed, the master even has the power to enter an order detaining a child until his trial. See Rule 911 a.1., Maryland Rules of Procedure.

8. Appellants contend that "the master is not clothed with even a vestige of judicial power...." Jurisdictional Statement at p. 11. From this premise, appellants conclude that jeopardy cannot attach to a hearing presided over by a person (i.e. a master) who has no power. The premise is factually erroneous and the conclusion is wholly illogical. Assuming that the master has no power to enter an order (see fn. 7, supra), he plainly has power to conduct complete trials, make judgments concerning factual and legal issues, and announce his views respecting innocence or guilt at the end of the trial. To conclude that jeopardy never attaches to the trial presided over by the master makes no sense. See Aldridge v. Dean, 395 F.Supp. at 1172, n. 25. Under such reasoning, initial jeopardy would either 1) attach and end simultaneously when the judge affixes his signature to the master's recommendation, 2) end when the judge affixes his signature even though it has never begun, or 3) not end even when the judge signs the order. The first two possibilities are totally illogical. The third possibility, while not illogical, necessarily requires the further conclusion that the child could be prosecuted again and again before a juvenile court judge for the same offense without double jeopardy concepts having any application, and could also be prosecuted at least once in the adult system for the same offense for which he was prosecuted as a juvenile. Such repeated prosecutions, however, are barred by the narrow holding of Breed.

argument is disposed of by United States v. Jenkins, supra, which the Jurisdictional Statement never discusses. The second argument cannot square with either this Court's treatment of the "continuing jeopardy" notion in Breed[9] or with the record in the instant case. Whatever might be said about the role of a master in another context, the record is uncontradicted in demonstrating that juvenile court masters in Maryland play the same role as the juvenile court judge respecting all matters that are relevant to the issue of whether jeopardy attaches. As the court below and the court in the habeas cases recognized, the double jeopardy clause is designed to protect an individual from the strain and risk incident to two trials for the same offense. Those risks take place whether the judicial officer at the first trial is called a master or a judge.[10]

---

9. The Jurisdictional Statement thoroughly confuses the relevant law pertaining to "continuing jeopardy" by introducing that concept as it was developed by Mr. Justice Holmes in Kepner v. United States, 195 U.S. 100 (1904). Appellants describe Mr. Justice Holmes' position as one that this Court "has not expressly adopted...." Jurisdictional Statement at p. 11. This is an understatement. Indeed this Court has uniformly rejected the doctrine as defined by Mr. Justice Holmes. The somewhat different doctrine, enunciated in Ball v. United States, 163 U.S. 662 (1896), that permits the retrial of the defendant who has had his first trial reversed on appeal, is based on completely different principles than those suggested by Mr. Justice Holmes. In the appeal situation, the defendant has waived his right to claim double jeopardy protections by affirmatively seeking to overturn the first conviction.

10. Appellants support their position by citing four cases: Bradley v. People, 258 Cal.App.2d 253, 65 Cal. Rptr. 570 (1968); In re Henley, 9 Cal.App.3d 924, 88 Cal.Rptr. 458 (1970); People v. J.A.M., 174 Colo.245, 483 P.2d 362 (1971); Jessie W. v. Superior Court of Mateo County, 133 Cal.Rptr. 870 (Cal.App. 1976). The first three cases were all decided before this Court's opinion in Breed v. Jones, supra, and consequently are of little current value. See slip opinion of the court below, at p. 10. Moreover, the J.A.M. case is distinguishable because the relevant Colorado statute permitted the parties to chose whether the child's case would be commenced before a referee instead of a judge. The court in J.A.M. noted that by chosing to appear before a referee, the juvenile knowingly waived his right to assert the double jeopardy prohibition on the occasion of his rehearing before the judge. See 483 P.2d at 364.

Although the last case cited above, Jessie W. v. Superior Court of Mateo County, was decided by an intermediate California State appellate court after this Court's decision in Breed, the Supreme Court of California granted review; the matter has been argued and is awaiting decision. Under Rules 976(d) and 977, California Rules of Court, a decision by the California Supreme Court to review a lower court opinion supersedes that opinion. The superseded opinion may not be published in the Official Reports or

CONCLUSION

For the foregoing reasons it is respectfully requested that the final judgment of the court below be affirmed.[11]

Peter S. Smith

Adrienne E. Volenik
Maryland Juvenile Law Clinic
500 W. Baltimore Street
Baltimore, Maryland 21201
Counsel for appellees

November, 1977

(fn. 10 cont'd.)

cited by a court or party, except for purposes of law of the case doctrine. Thus Jessie W. has no precedential or persuasive worth in California.

11.

Appellants alternatively urge this Court to summarily reverse. See Jurisdictional Statement at pp. 1, 13. It is settled that summary reversal in an appeal is appropriate only in the clearest of situations. See Stern and Gressman, Supreme Court Practice (4th ed. 1969) at 234. A survey of the October, 1976 Term, reveals only three summary reversals in cases which reached this Court by appeal. One of them was reversed and remanded with instructions to the trial court to consider fully the issues in the case. Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District, 51 L.Ed.2d 116 (1977). Plainly the instant case, decided by a unanimous three-judge panel, does not fall within that small group of decisions which are so obviously incorrect as to justify summary reversal.

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD BRADY, et al.,. *

v. * CIVIL NO. Y-74-1291

WILLIAM SNISHER, et al., *

MEMORANDUM AND ORDER

DATE: 9/16/77

PETER S. SMITH, Esq., Attorney for Plaintiffs, Baltimore, Maryland.

BERNARD RAUM, Esq., Assistant Attorney General, Attorney for Defendants, Baltimore, Maryland.

On November 25, 1974 plaintiffs[1] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton, Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory and injunctive relief, and to enjoin the defendants from subjecting plaintiffs to a second trial or disposition pursuant to Rule 908e 2 and 3, Md. Rules of Procedure, which plaintiffs allege violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. This action is brought pursuant to 42 U.S.C. § 1983 and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1343.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C. § 2284, plaintiffs filed a request for

---

[1] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact have been met and that the plaintiffs can adequately represent the interests of the class and are represented by competent counsel, that request is granted. Rule 23(a)(1) F.R.Civ.P. The class is designated as a (b)(2) class under Rule 23 F.R.Civ.P. and consists of all juveniles against whom, on or after June 12, 1976, the State of Maryland had filed exceptions to the finding of non-delinquency. This Court has previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The defendants have moved for relief from this order since the exceptions filed by the State's Attorney's Office were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney has also withdrawn its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before this three-judge panel (June 12, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception. The motion of Eugene Fields to intervene as a plaintiff will be granted. The motion of Meadows to intervene is denied and the defendants are granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

Pending determination of nine habeas corpus petitions, filed by the original plaintiffs here, the three-judge court stayed consideration of this case. On June 12, 1975 Judge Thomsen granted habeas corpus relief to six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. See, Aldridge v. Dean, 395 F. Supp. 1161 (D.Md. 1975).

On July 17, 1975 the defendants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the

Maryland legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813, and the Maryland Court of Appeals amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975, as well as the opinion of this Court in Aldridge v. Dean, supra. Former Rule 908e 2 and 3 no longer exists, but has been amended and reenacted as Rule 910e, Md. Rules of Procedure. The plaintiffs were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code Cts. & Jud. Proc. Art., § 3-813 and Rule 910e, Md. Rules of Procedure, violate the Double Jeopardy Clause of the Fifth Amendment, and an injunction enjoining the defendants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[2] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., § 3-813 and Rule 910e. The defendants' motion to dismiss this supplemental complaint was denied after a hearing on the motion.

The defendants reasserted their argument that this case should be dismissed on the ground of mootness. However, the intervention of Eugene Fields saves this case from becoming moot. At oral argument it was agreed that the State has filed an exception to the master's findings and recommendations and that a hearing has been set before the juvenile judge on the exception. Thus an actual case and controversy exists between the plaintiff, Eugene Fields, and the defendants.

An evidentiary hearing was conducted in the nine habeas corpus cases (Aldridge, supra) at which counsel stipulated that the evidence admitted there would be admissible in this proceeding

[2] This Court has granted plaintiffs' motion to substitute Swisher for Allen and Gault-then Mazelis-for Daly. In his complaint, Fields only seeks relief from Swisher, Gault and Daly.

subject to any objections. This Court conducted a brief evidentiary hearing and counsel have submitted several stipulations and additional documentation. Most of this new evidence brings up to date the statistics introduced in the Aldridge hearing.

A case is generally instituted when the Office of the State's Attorney files a petition which alleges that the "Named child under the age of eighteen years is Delinquent." If the case is filed in Baltimore City after arraignment, it is assigned to either the juvenile judge or one of the seven masters. The presiding juvenile judge in Baltimore City hears the more aggravated type of case, such as murder, rape or armed robbery. He also hears all cases in which the juvenile is represented by the Maryland Juvenile Law Clinic. If the case is assigned to a master, an adjudicatory hearing is held at which the State's Attorney presents his case. Each witness is sworn and subject to direct and cross examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case. After hearing argument, the master announces his finding to the parties, explaining the reasons for his conclusions. These proceedings are now recorded on tape. If the charges are not sustained, some masters inform the juvenile that the State has a right to take an exception. Others do not so inform the juvenile. Under Rule 910 the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, the juvenile judge has always signed the proposed order where the master has made a finding that the charge was not sustained

and the State does not take an exception, even though the judge may hold another hearing on his own motion. If an exception is taken, the matter is set for a hearing before the juvenile judge. If the State is the objecting party, the hearing must be on the record unless the juvenile assents to the introduction of evidence. In recent years the State has filed few exceptions to the findings of a master.

The legal issue, and only issue, presented in this case is whether the defendants are barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, see Benton v. Maryland, 395 U.S. 784 (1969), from taking exceptions to findings and recommendations of a master pursuant to Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813, and Rule 910e, Md. Rules of Procedure, in order to obtain a different resolution by the juvenile judge.

Md. Ann. Code, Cts. & Jud. Proc. art., § 3-813 provides:

> (a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. The standards expressed in § 3-803, with respect to the assignment of judges, shall also be applicable to the appointment of masters. A master must, at the time of his appointment and thereafter during his service as a master be a member in good standing of the Maryland Bar. This subsection shall not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.
> (b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.
> (c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.
> (d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them.
> (e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, if all parties and the court agree the hearing may be on the record.

Rule 910e provides:

> Upon the filing of exceptions, the judge shall instruct the clerk to schedule a hearing on the exceptions. A party who files exceptions, other than the State, may elect a hearing de novo or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. Either hearing shall be limited to those matters to which exceptions have been taken.

Clearly these two provisions conflict. The statute permits a de novo hearing if the party taking an exception requests one or if the court, on its own motion, decides not to adopt the master's findings. However, the rule provides that a hearing on exceptions filed by the State must be on the record and not de novo unless the juvenile raises no objection. Under

---

[3] Rule 910e was amended, effective January 1, 1977, and the clauses at issue in this case are now incorporated, without substantive changes, in Rule 911c Md. Rules of Procedure, paragraph 2:

> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing de novo or a hearing on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

Reference to the section is made in the remainder of the body of this opinion as Rule 910e [Rule 911c].

Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule-making power of the Maryland Court of Appeals. See County Fed. S. & L. v. Equitable Sav. & Loan, 261 Md. 246, 253 (1971). Here both the statute and the rule became effective on July 1, 1975; however, the rule was approved and adopted by the Court of Appeals after the statute was signed into law. At oral argument counsel agreed that the rule controls. Thus this Court need only discuss the provisions of the rule.

Resolution of the legal issue must consider two questions: (1) Whether the adjudicatory hearing before the master is a jeopardizing proceeding and (2) If so, whether the proceeding bars any further adjudication by the judge of the Juvenile Court. See Breed v. Jones, 421 U.S. 519 (1975); Whitebread & Batey, Juvenile Double Jeopardy, 63 Geo. L.J. 857 (1975).

The decisions of the Supreme Court in Breed and of Judge Thomsen in Aldridge clearly establish that jeopardy attaches when the State begins to offer evidence in an adjudicatory hearing before a master. In Breed the Court stated:

> We believe it simply too late in the day to conclude...that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years***.
> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." United States ex rel Marius v. Hess, [317 U.S. 537] at 548-549. Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens--psychological, physical, and financial--on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offense." [Citation omitted.]***
> Thus in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "'anxiety and insecurity' in a juvenile, and imposes a 'heavy personal strain.'" [Citation omitted.]
> *** We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to trial before the trier of facts," [Citation omitted], that is, when the Juvenile Court, as the trier of the facts, began to hear evidence.

Breed v. Jones, 521 U.S. at 529-531. Judge Thomsen, quoting this same language, concluded in Aldridge at 1172, "A juvenile is placed in jeopardy when the state begins to offer evidence in an adjudicatory hearing before a master." A similar conclusion was reached in Brenson v. Havener, 403 F. Supp. 221 (N.D. Ohio 1975).

Despite these decisions, the defendants, relying on Matter of Anderson, 272 Md. 85 (1974), argue that jeopardy does not attach when the State begins to offer evidence in an adjudicatory hearing before a master, but only when the master transmits his recommended findings to the juvenile judge. The Court of Appeals of Maryland in Matter of Anderson, supra, stated that the role of a master is only advisory and that a master has no judicial power. Defendants argue that since a master cannot enter a final order in the case, a juvenile is not placed in jeopardy when he appears before the master, thus distinguishing Breed where the juvenile originally appeared before a juvenile judge who had the power to enter a final order, if he so chose. The defendants in adopting this argument overlook the clear language in both Breed and Aldridge. Even though the master cannot enter a final order, the adjudicatory hearing still engenders elements of "anxiety and insecurity" in a juvenile and imposes a "heavy personal strain," and the juvenile

is put to the task of marshaling his resources against those of the State." Aldridge at 1173. The changes in the proceedings before a master, caused by the adoption of Rule 910, [Rule 911] do not alter the conclusion that jeopardy attaches when the State begins to offer evidence before a master in an adjudicatory hearing. That hearing is similar to a court trial in a criminal case. The State first presents its case by calling witnesses who are sworn and subject to cross-examination by the juvenile's counsel. If the juvenile's motion for a directed verdict is denied, then he may put on his case. Clearly jeopardy attaches at such a proceeding when the State begins to offer evidence before the master, the trier of facts.

Having determined that jeopardy attaches when the master begins to hear evidence, it must next be determined if a juvenile is placed twice in jeopardy when the defendants here take an exception to the findings of a master pursuant to Rule 910e [Rule 911c]. In analyzing the constitutionality of the procedures permitted by Rule 910e [Rule 911c], two issues must be considered: (1) Whether "continuing jeopardy" applies to this situation and (2) Whether the rehearing on the record before the juvenile judge is justified by interests of society, reflected in the juvenile court system, or by interests of the juveniles themselves. See Breed v. Jones, supra, at 534-535.

Besides the courts in Aldridge, Brenson and Matter of Anderson, two state courts have faced the application of the Double Jeopardy Clause to review by a juvenile court judge of a master's findings. In Bradley v. People, 65 Cal. Rptr. 570 (Ct. App. 1968), the California Court of Appeals, stressing the "conditional nature of a referee's order," found nothing in

the applicable provisions of the Juvenile Court Law, permitting a de novo review of a referee's order, which offended the Fifth and Fourteenth Amendments. Bradley at 575. Later, in following this holding in another case, the California Court of Appeals stressed that in Bradley "the determinative factor ... was the limited nature of the powers of a referee." In Re Henley, 88 Cal. Rptr. 458, 461 (Ct. App. 1970).

In People v. J.A.M., 174 Col. 245 (1971) (en banc), the Colorado Supreme Court held that a second hearing before the juvenile judge, following a referee's finding that the evidence was not sufficient to sustain the petition in delinquency, did not place the juvenile twice in jeopardy. The court stated:

> Under the provisions [of the statute], the findings and the recommendations of the referee do not have the effect of a final judgment until adopted or modified by the court.
>
> We are not here dealing with two separate proceedings, one before the referee and a second before the court, but rather with one proceeding to pass on the question of possible delinquency.

People v. J.A.M., supra, at 248-249.

Both cases were decided before the Supreme Court considered Breed v. Jones and contain language indicating that the Double Jeopardy Clause did not apply to juvenile proceedings. Thus, in light of Breed, these cases might be decided differently today.[4] Bradley turns on the theory that jeopardy does not

---

[4] Since the submission of final briefs in this case, counsel for the defendants has brought to the Court's attention two recent California cases concerned with review by juvenile court judges of referee's decisions. In Jesse W. v. Superior Court of Mateo County, 133 Cal. Rpt. 870 (1976), the court persisted in finding, as had the courts in the pre-Breed cases, that the subordinate judicial powers of the referees made their determination non-adjudicatory and that therefore there was a "continuing" jurisdiction over a case assumed by the juvenile court judge. "Presiding" power was held not to be the equivalent of "decisional" power. Jesse W. does not, in the opinion of this Court, square with the teaching of Breed, and the California
(Continued on next page)

attach at a hearing before a referee; however, this Court, with the advantage of the Supreme Court's language in Breed, has already determined that jeopardy does attach at a hearing before a master. The Colorado court's theory of "continuing jeopardy" constituting only one proceeding has been criticized. See Whitebread & Batey, Juvenile Double Jeopardy, 63 Geo. L. J. 857, 878 (1975). The same result is unlikely today in light of the statement in Breed that "...the fact that the proceedings against respondent had not 'run their full course' [Citation omitted], within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." Breed at 534. Thus, these cases are of little precedential value to this Court.

Several policies underlie the double jeopardy prohibition. The policies which most concern this Court now were best stated by Justice Black in Green v. United States, 355 U.S. 184, 187-188 (1957).

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.*** The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to

---

4(Continued from page 10)
court's holding that even though jeopardy attaches at the referee's hearing it is somehow of less than constitutional magnitude seems to be in error. Counsel for plaintiff in the instant case has informed this Court that Jesse W. is on appeal to the Supreme Court of California and thus is of little persuasive value. A second case, In re Anthony M., 64 Cal. App. 3d 464 (1976), does not even cite Breed and is clearly concerned with the impact of a juvenile's request for a rehearing, to which he is entitled as a matter of state law in California. Although there is, at 543, general language alluding to the subordinate status of the referee's opinion, the focus of the court's concern is upon the validity of a juvenile court's assessing a more severe penalty upon the rehearing of the juvenile's case.

> embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

A third policy relevant here is that the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. See Comment, Twice in Jeopardy, 75 Yale L.J. 262, 266-67, 277-78 (1965). Here, the defendants can take an exception under Rule 910e [Rule 911c] to a recommended disposition of probation to argue for detention before the juvenile judge.

The defendants have argued that jeopardy does not terminate with the submission of the proposed findings and recommendations by the master to the judge, but rather continues until the trial court is able to make an adjudication. In the past the concept of "continuing jeopardy" has only been applied in cases in which the defendant has successfully obtained a second trial. See Jones v. Breed, 497 F.2d 1160, 1167 (9th Cir. 1974). In recent years the Supreme Court has dealt with double jeopardy cases where the Government has taken an appeal. In United States v. Wilson, 420 U.S. 332, (1975), the Government appealed the grant of a postverdict motion for dismissal after the jury had entered a guilty verdict. However, the Third Circuit Court of Appeals barred review of the District Court's ruling on the ground of double jeopardy. The Supreme Court reversed on the ground that the constitutional protection against Government appeals attaches where there is danger of subjecting the defendant to a second trial for the same offense. There was no such danger in Wilson because, if the District Court's ruling was overturned, the jury verdict could simply be reinstated. Although the Court permitted the Government to appeal in such situations, the Court stated:

> ...we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to reexamine the weaknesses in his first presentation in order to strengthen the second; and it would disservice the defendant's legitimate interest in the finality of a verdict of acquittal.

United States v. Wilson, supra at 352.

The same day the Court ruled in Wilson it announced its decision in United States v. Jenkins, 420 U.S. 358 (1975). There, after a bench trial, the District Court "dismissed" the indictment and "discharged" the respondent. The Second Circuit dismissed the Government's appeal "for lack of jurisdiction on the ground that the Double Jeopardy clause prohibits further prosecution." Since the Court was unsure whether the District Court had based its decision on a determination of facts or on a resolution of a legal question, Wilson could not govern the case. The Court concluded:

> ...[I]t is enough for purposes of the Double Jeopardy Clause...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further proceedings at this stage would violate the Double Jeopardy Clause...

United States v. Jenkins, supra at 370.

Thus the defendants' contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme

Court in this context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge. The defendants' argument is basically that under the statutory scheme the hearing before the master and the later review by the juvenile judge are part of one continuing proceeding. The Supreme Court has stated that such an argument "does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial." Breed v. Jones, supra at 534.

The argument that the hearing before the juvenile judge may only be on the record and not de novo does not alter the inescapable conclusion. The most important element is that the State has more than one opportunity to convince a trier of fact of the guilt of the juvenile. In Jenkins, supra, the Supreme Court found that the Double Jeopardy Clause would be violated even if no additional evidence were to be taken by the trial court. Jenkins at 370. Interestingly in Breed the case in the adult criminal court was "submitted to the court on the transcript of the preliminary hearing." Breed at 525. Thus, it is not the taking of additional evidence or the conducting of a de novo hearing that violates the Double Jeopardy Clause; it is the subjecting of the juvenile to a second proceeding at which he must once again marshal whatever resources he can against the State's and at which the State is given a second opportunity to obtain a conviction. Merely declaring that the two proceedings are one does not answer these intrusions upon the policies of the Double Jeopardy Clause.

Although Rule 910e [Rule 911c] violates the Double Jeopardy Clause, this Court must consider if giving the juvenile the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile

court system. See Breed v. Jones, supra at 535. The defendants have offered no explanation of how the master system fosters the flexibility and informality of the juvenile court system. They do assert that if the master system is struck down by this Court that the case load would be too burdensome for the only juvenile judge currently sitting in Baltimore City. The Report of the Committee on Juvenile and Family Law and Procedure to the Maryland Judicial Conference (1976) recommends that the juvenile master system be eliminated and that all juvenile proceedings requiring judicial attention be handled by a juvenile court judge. The Report stated in part: "No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the 'step child' of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal behavior in general to be shunned and ignored as something beneath the dignity of a judge." Thus, the master system not only does not foster any of the goals of the juvenile court system, it may be a detriment. See also Final Report of the Commission on Juvenile Justice to the Governor and the General Assembly of Maryland, January 1, 1977.

Another factor to be considered in deciding whether a constitutional right should be applied to juvenile proceedings is the recommendations of various studies and model acts dealing with the juvenile court system. See In Re Gault, 387 U.S. 1 (1967); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. & Mary L. Rev. 266, 275 (1972).

There are three pieces of model legislation in the area of juvenile law: the Standard Juvenile Court Act, prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's bureau (6th Ed. 1959), hereinafter "Standard Act";

the Uniform Juvenile Court Act, approved by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter "Uniform Act"; and Model Act for Family Courts and State-Local Children's Programs, prepared by the Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter "Model Act". Section 7 of the Standard Act provides in part, "The judge may direct that any case...shall be heard in the first instance by a referee...but any party may, upon request, have a hearing before the judge in the first instance." Any party may then file with the judge a request for review of the referee's findings and recommendations. Section 7(b) of the Uniform Act provides: "The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge." Again any party may request a rehearing by the judge. Section 4(b) of the Model Act provides:

> Delinquency and neglect hearings shall be conducted only by a judge if:
>
> (1) The allegations set forth in the neglect or delinquency petition are denied;
>
> (2) The hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or
>
> (3) A party objects to the hearing being held by a referee.
>
> Otherwise, the [judge] may direct that hearings in any case or class of cases shall be conducted by a referee in the manner provided by this (act).

Any party shall receive a hearing if he requests one.

The differences between these model laws and Maryland's statutory scheme are obvious. All the model acts permit any party to have the case heard in the first instance by the judge. Rule 910e [Rule 911c] of the Maryland Rules of Procedure does

not permit this right. The Model Act, which is the most recent of the model legislation, also takes away from the referee or master delinquency and neglect hearings if the allegations set forth in the neglect or delinquency petitions are denied. Thus, the master would only hear routine matters that do not require the qualifications of a judge. These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings.

Accordingly, it is this 16th day of September, 1977, by the United States District Court for the District of Maryland, ORDERED:

1. Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge; and

2. Defendants, their agents, employees, persons acting in concert with them, and their successors in-office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. § 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

Harrison L. Winter
United States Circuit Judge

United States District Judge

United States District Judge

ATTACHMENT B

Rec'd 9-21-77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD BRADY; MICHAEL A. EPPS; JAMES LOVE, a minor by JOYCE LOVE, his mother and next friend; PHILLIP WITHERSPOON, a minor by ELSIE WITHERSPOON, his mother and next friend; JOSEPH FENWICK, a minor by WILLIAM BECKETT, his stepfather and next friend; WILLIAM L. CAMPBELL, a minor by WILLIAM CAMPBELL, his father and next friend; ANDRE ALDRIDGE, a minor by RUTH KENT, his mother and next friend; GEORGE McLEAN, a minor by MINNIE JOHNSON, his mother and next friend; QUINTON R. STEWART, a minor by HAYNIE STEWART, his father and next friend

v.

Civil No. Y-74-1291

WILLIAM SWISHER, State's Attorney for Baltimore City; HOWARD MERKER, Chief of Operations, Office of State's Attorney for Baltimore City; SHELDON MAZELIS, Chief, Juvenile Court Services Division, Office of State's Attorney for Baltimore City; JAMES BENTON, Deputy Clerk, Circuit Court for Baltimore City, Division for Juvenile Causes

JUDGMENT

In accordance with the Memorandum and Order of the Honorable Harrison L. Winter, United States Circuit Judge, the Honorable Edward S. Northrop, United States District Chief Judge, and the Honorable Joseph H. Young, United States District Judge, filed September 16, 1977 in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e (Rule 911c) Md. Rules of Procedure are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge, or (b) to a juvenile court master disposition, and seek a new disposition before the juvenile court judge.

2. That defendants, their agents, employees, persons acting in concert with them, and their successors in office are enjoined from taking exceptions to findings of non-delinquency or from taking exceptions to disposition pursuant to Md. Ann. Code Cts. & Jud. Proc. Art. Sec. 3-813 and Rule 910e, Rule 911c, Md. Rules of Procedure.

Dated at Baltimore, Maryland this 19th day of September, 1977.

PAUL R. SCHLITZ, Clerk

BY: R. Bruce McElhone
R. Bruce McElhone
Deputy Clerk

APPPOVED this 19th day of September, 1977.

Joseph H. Young
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

Constitutional Provisions

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

OPINION BELOW

The District Court issued its opinion on September 16, 1977. The opinion has been reported. See *Brady v. Swisher,* 436 F. Supp. 1361 (D. Md. 1977). It is also reprinted at pages 1a to 18a of the Appendix to the Appellants' Jurisdictional Statement (AJS. 1a).[1]

[1] References to the Appendix to the Jurisdictional Statement will be referred to as "AJS" and references to the Appendix to this Brief for Appellants as "A." The pagination in the Appendix to the Jurisdictional Statement is in the form of "1a, 2a, 3a, . . ." while that of the Single Joint Appendix is "A.1A, A.2A, A.3A, . . ."

JURISDICTION

The jurisdiction to entertain this appeal from a decision of a United States District Court sitting as a court of three judges is premised upon 28 U.S.C., Section 1253. The three judge court was convened in this case pursuant to the authority of 28 U.S.C. Section 2281 and 2284 as the relief sought in this case filed November 25, 1974 was an injunction to prevent enforcement of the state statute and rules promulgated thereunder. Although Section 2281 was repealed effective August 12, 1976 and Section 2284 was amended effective that same date, the appeal here is nevertheless proper under Section 1253 because repeal and amendment of these sections does not effect causes of action commenced on or before August 12, 1976. Section 7, Pub. L. 94-381 (28 U.S.C., Section 2284). The judgment of the District Court was entered on September 19, 1977, when the District Court issued its final order granting Appellees declaratory and injunctive relief. Appellants noted an appeal on October 14, 1977 and probable jurisdiction was noted by this Court on November 28, 1977.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Maryland Code (1977 Repl. Vol.) Volume 9B, Rule 911 of The Maryland Rules of Procedure, which the District Court determined was unconstitutional insofar as it permitted the State to file exceptions to a juvenile court master's proposed findings and recommendations, reads as follows:

Rule 911. Masters.

a. Authority.

1. Detention or Shelter Care.

A Master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A Master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. Report to the Court.

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers.)

c. Review by Court if Exceptions Filed.

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. Review by Court in Absence of Exceptions.

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)

The critical rule provisions were once included in Rule 908e 2 and 3. Effective July 1, 1975, the provisions were recodified in Rule 910e, and as a result of the recent amendments to the rules are now incorporated, without substantive changes, in Rule 911c.

Also relevant to this case are the provisions of Rule 910 and of Courts and Judicial Proceedings Article, Section 3-813. These statutory and rule provisions are reprinted at pp. 20a-23a of the Appendix to the Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether the District Court erred in determining that the State is barred by the double jeopardy clause of the Fifth Amendment of the Constitution of the United States from taking exceptions to the proposed findings and recommendations of a juvenile master in order to obtain a review on the record by the juvenile judge.

STATEMENT OF THE CASE

Procedure

On November 25, 1974, Appellees[2] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief, Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton, Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory relief and praying that the Appellants be enjoined from subjecting Appellees to a second trial or disposition pursuant to what was then Rule 908e 2 and 3, (presently Rule 911c) Md. Rules of Procedure, which Appellees alleged violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. This action was brought pursuant to 42 U.S.C., Section 1983 and the District Court's jurisdiction was invoked pursuant to 28 U.S.C., Section 1343.

Pending determination of nine habeas corpus petitions filed by the original plaintiffs, the three-judge court stayed consideration of this case. On June 12, 1975, Judge Thomsen granted habeas corpus relief to

[2] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. See *Aldridge v. Dean,* 395 F. Supp. 1161 (D. Md. 1975).

On July 17, 1975, the Appellants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the Maryland Legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., including new Section 3-813, and the Maryland Court of Appeals had amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975 and to the opinion of the District Court in *Aldridge v. Dean, supra.* Former Rule 908e 2 and 3 no longer exist, but were amended and reenacted as Rule 910e (now, Rule 911c), Md. Rules of Procedure. The Appellees were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code, Cts. & Jud. Proc. Art., Section 3-813 and Rule 910e (911c), Md. Rules of Procedure, violated the Double Jeopardy Clause of the Fifth Amendment and an injunction enjoining the Appellants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[3] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., Section 3-813, and Rule 910e (911c). The Appellants' motion to dismiss this supplemental complaint was denied after a hearing.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C., Section 2284, Appellees filed a

[3] The Court granted plaintiffs' motion to substitute Swisher for Allen and Gault, and later Mazelis, for Daly. In his complaint Fields only sought relief from Swisher, Gault and Daly.

request for certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact had been met and that the Appellees could adequately represent the interests of the class and were represented by competent counsel, the request was granted. Rule 23(a)(1), F. R. Civ. P. The class was designated as a (b)(2) class under Rule 23 F. R. Civ. P. consisting of all juveniles against whom the State of Maryland had filed exceptions to a master's finding of non-delinquency on or after June 12, 1976. The District Court had previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The Appellants moved for relief from this order since the exceptions filed by the State's Attorney's Office in those cases were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields, on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney also withdrew its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before the three-judge panel (June 1, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception.[4] The motion of Eugene Fields to intervene as a plaintiff was granted. The motion of Meadows to

[4] The three judge district court held that the intervention of Eugene Fields saves this case from becoming moot since the State had filed an exception to the master's findings and recommendations which were pending at the time of the hearing (AJS 4a). In the opinion of Appellants'counsel, an actual case and controversy exists, notwithstanding the subsequent withdrawal of these exceptions, because of the designation of this case as a class action. The unnamed members of the class retain a personal stake in the outcome of the controversy, an adversary relationship exists and "a live controversy (remains) at the time this Court reviews the case." *Franks v. Bowman Transportation Company, Inc.,* 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

intervene was denied and the Appellants were granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

On September 16, 1977, the three judge District Court rendered their decision on this case in a written memorandum and order. The District Court held that Courts Article, Section 3-813 and Maryland Rule 911c are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master's desposition and seek a new desposition before the juvenile court judge. The District Court ordered that the State be enjoined from taking exceptions in those instances referred to hereinabove.

Facts

A case in Juvenile Court is generally instituted when the office of the State's Attorney files a petition which alleges that the named child under the age of eighteen years is delinquent. (A.7A). If the case is filed in Baltimore City it is assigned (after arraignment) either to the juvenile judge or to one of the seven masters in accordance with Rule 911a.2. The presiding judge of the juvenile court hears originally all petitions for waiver of jurisdiction of the court. Secondly, he hears all exceptions to recommended findings by the masters, on the issue of adjudication and disposition as well as on the issue of detention. In addition, he would normally hear originally the more aggravated types of cases such as murder, rape or armed robbery where those charges are within the jurisdiction of the juvenile court under the provisions of the Maryland Code. Finally, the judge

hears originally all cases wherein the respondent is represented by the Juvenile Law Clinic. (A.45A).[5]

If the case is assigned to a master, the juvenile appears and is advised of his right to counsel. Unless there is a waiver of counsel, the juvenile generally is represented by the office of the Public Defender because in the majority of the cases the juvenile is indigent. (A. 8A). After the petition is read, the Assistant State's Attorney presents his case. Each witness is sworn and subject to direct and cross-examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case in which the witnesses are also sworn and subject to direct and cross-examination. At the conclusion of the entire case, after hearing argument, the master announces his recommended findings to the parties, explaining the reasons for his recommendations (A. 11-17A). These proceedings are now recorded on tape (A. 44, 49, 55A). If the charges are not sustained, some masters inform the juvenile that the State has the right to take an exception; others do not so inform the juvenile (A. 43, 53A). Under Rule 911(b) the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, if an exception is taken, the matter is set for hearing

[5] Since the students who practice as part of that clinic under the supervision of Mr. Smith and Mr. Dantes practice pursuant to Rule 18 of the Rules applicable to admission to the Maryland Bar, the Judge feels a personal responsibility to monitor their performance (A.45A).

before the juvenile judge. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing is on the record, supplemented by such additional evidence as the judge considers relevant *and to which the parties raise no objection.* In either case the hearing is limited to those matters to which exceptions have been taken. In the absence of an exception, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and proposed or other appropriate orders may be entered based on them. However, the court may remand the case to the master for further hearing or may, on its own motion, schedule and conduct a further hearing, supplemented by such additional evidence as the court considers relevant *and to which the parties raise no objection.*

SUMMARY OF ARGUMENT

Appellants submit that the District Court erroneously applied the prohibition on double jeopardy to Maryland's juvenile court master procedures. The determination that allowing the State to take exceptions to the master's proposed findings and conclusion of non-delinquency and to obtain a hearing on the record before a juvenile court judge violates the juvenile's double jeopardy protection is wrong in two respects, as will be fully demonstrated in the argument to follow.

First, the District Court erred in concluding that jeopardy attached at the master hearing because jeopardy does not attach until an accused is brought before a court of competent jurisdiction. A master, who exercises none of the judicial power of Maryland, is not such a tribunal.

Secondly, assuming that jeopardy does attach before the master, the District Court erred in determining that

a master's recommended finding of non-delinquency constitutes a final adjudication and that the hearing before the juvenile court judge therefore constitutes a second, rather than continuing, jeopardy. The error lies in the fact that under the Maryland procedure, the recommendation of the master is not a final resolution of some or all of the factual elements of the offense charged and therefore is not tantamount to an acquittal or to dismissal of the petition.

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT THE DOUBLE JEOPARDY CLAUSE BARS THE APPELLANTS FROM TAKING EXCEPTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS OF THE JUVENILE MASTER IN ORDER TO OBTAIN A REVIEW ON THE RECORD BY THE JUVENILE JUDGE.

In the instant case the legal issue, and the only issue presented in the court below, was whether the Appellants were barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, from taking exceptions to the proposed findings and recommendations of a master pursuant to Maryland Rule 911(c) in order to obtain a review on the record by the juvenile judge. Rule 911(c) provides:

> "Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).
>
> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de*

> *novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken."

The District Court found that the resolution of this legal issue was dependent upon consideration of two questions: whether jeopardy attached at the hearing before the master and whether the hearing before the master bars a review by the judge of the juvenile court. The court affirmatively answered the first question and rejected the Appellants further argument that, assuming the attachment of jeopardy at the master hearing, jeopardy continues until the final adjudication by the judge. The District Court concluded that Rule 911(c) violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution to the extent that the Rule permits the State to file exceptions: (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master's disposition and seek a new disposition before the juvenile court judge. The Appellants respectfully submit that the District Court erred in its legal determination of the issues in this case.[6]

---

[6] The District Court considered three model or uniform acts which give the juvenile an option in the first instance to have his case heard before either a master or judge of the juvenile court. After noting that the Maryland statutes and rules do not permit such a right, the Court stated: (AJS 17a)

> "These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings."

While the Appellants agree with this rather broad statement, they fail to understand what bearing the model acts have upon the issue of whether the double jeopardy principle does or does not apply under the facts of this case.

A. Jeopardy Does Not Attach At The Hearing Before The Juvenile Master But Attaches For The First And Only Time When The Juvenile Court Begins To Review The Record Or Hear Evidence Upon Exceptions Filed By The State.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". The early development of this clause can be traced to Greek and Roman law as well as to the common law of England. For a detailed historical discussion of double jeopardy see *Bartkus v. Illinois,* 359 U.S. 121, 151-155, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); *United States v. Jenkins,* 490 F.2d 868, 870-873 (CA 2, 1973). This Court has observed that the Double Jeopardy Clause provides three related protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

It is the first of these protections that is at issue in this case.

The double jeopardy clause has been incorporated into the Due Process Clause of the Fourteenth Amendment and is applicable to the States. *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

This principle was applied to juvenile proceedings in the recent case of *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779, 1787, 44 L. Ed. 2d 346 (1975), but this Court limited its holding as follows:

"We therefore conclude that respondent was put in jeopardy at the adjudictory hearing. Jeopardy attached when respondent was 'put to trial before the trier of fact' . . . that is, *when the juvenile court, as the trier of facts, began to hear evidence.*" (Emphasis added and Citations omitted).

Although articulated in different ways by this Court, the purposes of and the policies which animate the Double Jeopardy Clause in this context are clear:

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. The underlying idea, one that is deeply ingrained in at least the Anglo-American System of Jurisprudence, is that the State, with all of its resources and power, should not be allowed to be make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States,* 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199 (1957).

See also United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971), and *United States v. Martin Linen Supply Co.,* ___ U.S. ___, 97 S. Ct. 1349, 21 Cr. L. 3001 (decided April 4, 1977).

As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, this Court has found it useful to define a point in criminal proceedings at which the aforementioned constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is impanelled and sworn. In a non-jury trial jeopardy attaches when the Court begins to hear evidence. *Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 1062 (1975). Simply stated, "the principles given expression through that Clause (double jeopardy) apply to cases tried to a *judge*" (Emphasis Added). *United States v. Jenkins,* 420 U.S. 358, 95 S. Ct. 1006, 1011 (1975).

Within this framework of constitutional principles, the first question to be considered is whether jeopardy attaches at the hearing before the juvenile master. In this regard it becomes important to consider the function and authority of the master, generally appointed by the juvenile court to assist in the performance of the court's duties.[7]

Maryland Constitution, Article 4, Section 1 reads:

"The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Court, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom."

It was held in *Mayor and City Council of Hagerstown v. Dechert,* 32 Md. 369, 383-384 (1870) that the General Assembly could not vest judicial power in any other officer except those enumerated in the first section of the Fourth Article of the Constitution of Maryland. Section 3-813 of the Courts and Judicial Proceedings Article of the Maryland Code provides that the judges

[7] Although this case involves the juvenile master system of Baltimore City, juvenile masters are appointed and are currently serving under the Circuit Courts sitting as a juvenile court in other Maryland subdivisions: Baltimore County (2 masters), Anne Arundel County (2), Howard County (1), Carroll County (1) and Harford County (1). In Baltimore City seven (7) masters serve under one (1) judge of the Circuit Court of Baltimore City, Division of Juvenile Causes. Three masters serve in Prince George's County (To be replaced by Circuit Court Judges effective July 1, 1978).

of the Circuit Court and the Supreme Bench of Baltimore City may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals.

Under the Maryland Constitution a master is entrusted with no part of the judicial power of the State. *Matter of Anderson, et al.*, 272 Md. 85, 106, 321 A.2d 516 (1974). In addition, "the proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court." Courts Article, Section 3-813(d). The master's determinations are not binding until adopted by the court. Courts Article, Section 3-813(d); Maryland Rule 911(d). His function is that of a ministerial officer and advisor to the court. *Matter of Anderson, supra.* The activities of the juvenile master may be likened to those of a traditional master in chancery. It is not within the general province of a master to pass upon all the issues in an equity case, nor is it proper for the court to refer the entire decision of a case to him without the consent of the parties. The Court cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its lesser officers. *Kimberly v. Arms,* 129 U.S. 512, 524, 9 S. Ct. 355, 359, 32 L. Ed. 764, 768 (1889).

Maryland's juvenile court law provides for review and adoption, modification or rejection by the judge of the juvenile court of the master's proposed findings of fact, conclusions of law and recommendations. Maryland Rule 911(d). Rule 911 also provides that the juvenile court may remand a case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection.

This statutory reservation of ultimate authority to the judge of the juvenile court is required by, and is in full accordance with, the State constitution. The juvenile court law directs masters to hear cases assigned by the presiding juvenile court judge but subjects the master's findings and orders resulting from such hearings to procedures for their review by the presiding juvenile judge.

In a similar vein, the case of *Mississippi v. Arkansas,* 415 U.S. 289, 94 S. Ct. 1046, 39 L. Ed. 2d 333 (1974), although not concerned with the double jeopardy principle in a criminal case, illustrates the use of a special master by the Supreme Court of the United States in a case where it had original jurisdiction. Mr. Justice Blackmun there said for the court:

> "Upon our independent review of the record, we find ourselves in complete agreement and accord with the findings of fact made by the Special Master." Id. at 94 S. Ct. 1047.

He concluded that opinion by saying:

> "Upon our own consideration and our independent review of the entire record of the report filed by the Special Master, of the exceptions filed thereto, and the argument thereon, a decree is accordingly entered." Id. at 94 S. Ct. 1049.

As the Court of Appeals of Maryland noted in *Matter of Anderson, supra,* in discussing *Mississippi v. Arkansas, supra:*

> "Surely no one would contend that the recommendation made by a special master after a hearing before him constitutes a final determination of the matters there in dispute." Id. 272 Md. at 105.

Thus, it can be seen that much the same as the Supreme Court employed the use of a master to gather and present evidence and recommendations for the Court's benefit without delegating its judicial power so Maryland does with regard to its juvenile masters under

Chapter 900 of the Rules of Procedure, without delegating to them judicial authority. There is no substantial risk of second prosecutions and second fact finding procedures and contrary adjudications, but rather there is established one specific continuing delineated procedure utilizing the master merely as an advisor to the court. There is no improper delegation of power, there is no judicial authority vested in the master and his findings of fact and conclusions of law are not binding on the trial court even if they are stipulated to.

Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." *Kepner v. United States,* 195 U.S. 100, 133, 24 S. Ct. 797, 49 L. Ed. 114 (1904). Without risk of a determination of guilt, jeopardy does not attach and neither an appeal nor further prosecution constitutes double jeopardy. *Serfass v. United States, supra* at 95 S. Ct. 1064.

A few examples will serve to illustrate the application of this rule. In *United States ex rel Rutz v. Levy,* 268 U.S. 390, 293, 45 S. Ct. 516, 517, 69 L. Ed. 1010 (1925) the Court held that a preliminary hearing before a magistrate to determine whether or not there was sufficient evidence to warrant holding the accused for action of the grand jury was not a trial. The accused was not thereby put in jeopardy and his discharge as a result of such hearing did not bar his subsequent prosecution for the offense giving rise to the preliminary hearing.

In *Ocampo v. United States,* 234 U.S. 91, 34 S. Ct. 712, 58 L. Ed. 231 (1914), which came from the Philippine Islands, Mr. Justice Pitney, speaking for the Supreme Court, after referring to the function of committing

magistrates generally as well as under the laws applicable to the Philippines, said:

> "There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal but only entitles the accused to his liberty for the present leaving him subject to rearrest." 234 U.S. 100.

In the instant case, as indicated above, the master has no power to decide the "guilt or innocence" of the juvenile; rather he can only submit proposed findings of fact, conclusions of law and recommendations to the presiding juvenile judge, who may or may not adopt those proposals. Hence, the judge of the juvenile court alone has *jurisdiction* to adjudicate the issue. The master, as pointed out by the State's constitution, statutes, rules and judicial decisional authority, has no such jurisdiction or authority.

Ignoring these principles, the District Court found that jeopardy attached at the master hearing because the hearing "engenders elements of 'anxiety and insecurity' in a juvenile and imposes a 'heavy personal strain', and the juvenile is put to the task of marshalling his resources against those of the State." (AJS 9a). However, the Appellants submit that the District Court put the proverbial cart before the horse in reaching this conclusion. The factors referred to by the District Court *viz.,* protection against anxiety and insecurity etc., are indeed among the underlying policies and purposes to be served by the double jeopardy principle. However, these policies are not factors *determinative* of the "attachment of jeopardy" in a given case. They are only implicated when the accused has actually been placed in jeopardy.

An illustrative comparison will demonstrate the fallacy of the District Court's conclusion. An individual is arrested by the police who have probable cause to

believe that he has committed a larceny. The accused is then taken before a Commissioner for a bail hearing, appears for a probable cause hearing and is then bound over to the Grand Jury. He may appear before the Grand Jury where other witnesses appear and testify under oath. At the conclusion of these proceedings an indictment is returned and the accused is arraigned. Undoubtedly, all of these proceedings call upon the accused to marshall his resources against those of the State and engender elements of anxiety and insecurity and subject the accused to embarrassment, expense and the ordeal of defending against efforts to prosecute him. However, no one would seriously contend that double jeopardy applies in such a case. The obvious reason is that the defendant has not been *tried* before a court of competent jurisdiction. Likewise, in the instant case, since the hearing before the juvenile master is not before a judge or court of competent jurisdiction, capable of adjudicating guilt or innocence jeopardy does not attach. *Serfass v. United States, supra; United States v. Martin Linen Supply Co., supra.*

Because the District Court relied heavily upon this Court's decision in *Breed v. Jones, supra,* to find that jeopardy attached at the hearing before the master, some discussion is necessary to show that the court's reliance on *Breed* was misplaced. There, a petition was filed against the juvenile in the juvenile court of the Superior Court of California, County of Los Angeles, alleging that the juvenile had committed armed robbery. An adjudicatory hearing was held in the juvenile court and the testimony of two prosecution witnesses and the juvenile was taken. At the conclusion of the hearing, the court found that the allegations in the petition were true and sustained the petition. At a disposition hearing the court found the respondent "not amenable to the care, treatment and training program available through the facilities of the juvenile court".

421 U.S. 523. At the request of the respondent, the hearing was continued for a week. At that time, having considered the report and testimony of a probation officer, the court declared the respondent "unfit" for treatment as a juvenile and ordered that he be prosecuted as an adult.

Subsequently a criminal information was filed against the juvenile in the Superior Court charging him with the same armed robbery. That court found respondent guilty and ordered that he be committed to the California Youth Authority. The case eventually reached this Court following appeals through the federal courts on the ground that the juvenile had been twice placed in jeopardy for the same offense by virtue of the successive trials in the juvenile and superior court.

In discussing the double jeopardy principle, Mr. Chief Justice Burger said:

> "Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing *such as was held in this case* from a traditional criminal prosecution." 421 U.S. at 530. (Emphasis added)

The Court concluded that the respondent was put in jeopardy at the adjudicatory hearing "when the juvenile court, as the trier of fact, began to hear evidence." *Id.* at 532. The Appellants submit that the clear language of the holding reflects an express intent by this Honorable Court to limit the application of the double jeopardy principle to the specific facts of the *Breed* case. The Court made it clear that it would no longer tolerate State procedures which allow a juvenile to be tried on a criminal charge in a juvenile court and then tried on the same charge in an adult criminal court. However, in the instant case, juvenile proceedings commence in a juvenile court and terminate there. Unlike *Breed,* the case is not first tried in the juvenile court and then transferred to the adult criminal court.

The fundamental and crucial distinction between *Breed* and the present case is that the master makes no adjudication. He merely submits his proposed findings and recommendation to the juvenile court judge. If the State wishes to except to those findings and recommendations, it may do so, but the hearing on those exceptions is on the record of the proceedings before the master unless the juvenile agrees otherwise. There is no initial determination of juvenile delinquency and then a criminal conviction in some other court. There is only one determination *viz.*, juvenile delinquency made by the juvenile court. The Appellants submit that the District Court, in applying *Breed* to the instant case, was unreasonably extending *Breed* in a manner neither expressly nor impliedly contemplated by this Honorable Court.

Based upon our discussion of *Breed,* it is urged, contrary to the opinion of the District Court, that the decisions of the California, Colorado and Arizona courts are viable precedents in support of the Appellants' position. These courts, in rejecting the plea of double jeopardy, sanctioned the use of juvenile referees in much the same way as the master functions in Maryland. See *Bradley v. People,* 65 Cal. Rptr. 570 (1968); *In Re Henley,* 88 Cal. Rptr. 458 (1970); *Jesse W. v. Superior Court of Mateo County,* 133 Cal. Rptr. 870 (1976); *People v. J. A. M.,* 174 Col. 245 (1971); *Matter of Maricopa* etc. 549 P.2d 614 (Ariz. 1976).

In view of what has been said about the absence of jeopardy during the proceedings before the master, attention is next focused upon the proceedings before the juvenile court. In this respect the specific procedure condemned by the District Court was that of exceptions taken by the State to have the juvenile court review the proposed findings and recommendations of the master. Since the proceedings in the juvenile court are before a

judge as opposed to a jury, jeopardy attaches when the court begins to hear evidence. *Serfass v. United States, supra.* In Maryland this would occur when the first witness begins to testify at a *de novo* hearing. However, if the juvenile elects to have the court consider only the record of the proceedings before the master, then jeopardy would attach when the court is first presented with any evidence of the record from the master's hearing.

Appellants respectfully submit that, in accordance with the procedure under the Maryland statutes and rules, there is no violation of the double jeopardy principle because jeopardy does not attach during the proceedings before the master. Rather, jeopardy attaches for the first and only time when the juvenile court receives the case from the masters upon exceptions filed by the State.

B. Assuming jeopardy attaches at the juvenile master hearing, Maryland Procedure contemplates one continuous uninterrupted juvenile proceeding culminating in the decision by the Judge of the juvenile court.

If this Honorable Court decides that jeopardy attaches at the hearing before the master, the Appellants respectfully submit that notwithstanding exceptions filed by the State to the recommendations of nondelinquency or disposition made by the master, jeopardy continues and is concluded by the decision of the judge of the juvenile court.

The concept of "continuing jeopardy" was first given implicit recognition in *United States v. Ball,* 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 2d 300 (1896). The Court expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction

had been set aside. Seventy four years later this Court, in *Price v. Georgia,* 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 300 (1970), held that *Ball,* ". . . effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." 398 U.S. 326. See also *Green v. United States,* 355 U.S. 184, 189, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

The application of the principle to retrial after an acquittal was considered in *Kepner v. United States, supra,* where the Court held that the Fifth Amendment double jeopardy prohibition barred the government from appealing an acquittal in a criminal prosecution over a dissent by Mr. Justice Holmes that there was only one continuing jeopardy until the proceedings against the accused had been finally resolved. Mr. Justice Holmes was of the view that, even if an accused was retried after the government had obtained reversal of an acquittal, the second trial was part of the original proceedings. The Holmesian view seeks to apply the continuing jeopardy principle in a context where the proceeding is continuous, albeit interrupted, by the acquittal of the defendant.

More recently, in *Breed v. Jones, supra,* the Court, noting that the "Holmes view has never been adopted by the majority of this Court", stated that the phrase continuing jeopardy "describes both a concept and a conclusion." 421 U.S. 534. While declining to apply the principle there, the Court seemed to leave the matter open for future consideration in cases where the interests of society, as reflected in the juvenile court system, or the interests of the juveniles themselves, might be of sufficient substance to render tolerable the costs and burdens placed upon juveniles, thus permitting an exception to the double jeopardy principle. 421 U.S. 534-535. In the present case the continuing jeopardy

concept has an even greater emphasis placed upon the word "continuing" than under the Holmes view because, as will be shown below, the proceeding in a Maryland juvenile court is continuous *and is not interrupted,* as in *Kepner, supra,* by an acquittal or by the legal equivalent of an acquittal. In *Breed,* the court was obviously referring to the Holmesian view of continuing jeopardy when it suggested a possible exception to the principle. However, due to the nature of juvenile proceedings in Maryland, the Appellants submit that it is unnecessary for the Court to consider the application of the exception to this case since the context in which the exception was stated (where the proceedings are interrupted by a purportedly final adjudication) is entirely different from the present case where the proceedings are not interrupted by an acquittal or conviction and there is no second trial, but rather one continuous *uninterrupted* proceeding.

The District Court again relied upon *Breed v. Jones, supra,* to conclude that the continuing jeopardy principle does not apply in the instant case, but once again failed to take into account the facts of the *Breed* case. It is apparent that this Court found that an adjudicatory hearing before the judge of a juvenile court sustaining the charges of delinquency does not continue when the juvenile is then charged with the same offense in the adult criminal court. The obvious distinction between *Breed* and the present case is that in *Breed* two separate courts make two separate and distinct determinations *viz.,* delinquency in the juvenile court and conviction of a crime in a criminal court. But in the instant case only one determination, viz., delinquency by the judge of the juvenile court, is made. This determination is made in one continuous uninterrupted proceeding beginning with the master and terminating with the judge of juvenile court.

The crucial issue to be considered is whether the proposed recommendation of non-delinquency made by the master constitutes some form of acquittal or dismissal of the petition resulting in a discontinuance of jeopardy. If so, the exceptions taken by the State could be the equivalent of an appeal from an "acquittal" so that a hearing before the juvenile judge either *de novo* or on the record would be a second jeopardy in violation of the double jeopardy principle.

In this context the District Court, in rejecting the continuing jeopardy theory, cited and discussed the two recent decisions of this Honorable Court of *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013 (1975), and *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006 (1975). In *Jenkins*, the district court having heard evidence in a bench trial, dismissed an indictment charging the accused with refusing to submit to induction into the armed forces. Although the district court acknowledged that the defendant had failed to report for induction as ordered, it reasoned that the retroactive application of an intervening appellate decision (which would not have allowed a claim of "conscientious objection" to be considered if made after notice of induction had been given) would be unfair and concluded that it could not "permit the criminal prosecution of the defendants . . . without necessarily eroding fundamental and basic equitable principles of law." On this basis, and without entering any general finding of guilt or innocence, the district court dismissed the indictment and discharged the defendant. In concluding that an appeal by the government would violate the double jeopardy clause the Supreme Court held:

> "In those cases, where the defendants had not been adjudged guilty, the Government's appeal was not permitted since further proceedings, usually in the form of a full retrial, would have followed. Here

> there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. Sec. 3731, that further proceedings of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause: . . ." 95 S. Ct. at 1013.

In *United States v. Wilson, supra*, the jury entered a guilty verdict against the defendant for a federal offense. Pursuant to one of the defendant's post verdict motions, the district court dismissed the indictment on the grounds that the delay between the offense and the indictment prejudiced the defendant's right to a fair trial. The government noted an appeal. This Court held that when a trial judge rules in favor of the defendant after a guilty verdict has been entered by the trier of fact, the government may appeal from that ruling without contravening the double jeopardy clause. The Court's reasoning was based on the fact that the district court's ruling in defendant's favor could be disposed of on appeal without subjecting the defendant to a second trial at the government's behest.

Relying upon these decisions, the District Court here stated: (AJS 14a)

> "Thus, the Defendant's contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme Court in this

context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge."

Initially, it is incumbent to note that both *Wilson* and *Jenkins* involved the dismissal of indictments by courts. *Wilson* involved dismissal in a *jury trial* after the jury's verdict and *Jenkins* involved dismissal in a *court trial* at the close of evidence. The District Court here ignored the critical fact that those cases involved the actual dismissal of indictments, and, instead of recognizing the significant difference between the dismissal of an indictment and a master's proposed recommendation of non-delinquency, focused instead upon the hearing of the trial judge in its review of the exceptions. The Appellants would agree that if the master's proposed recommendation was the equivalent of a dismissal of an indictment, then *Wilson* and *Jenkins* would apply. However, since the action of the master is not final, it is not tantamount to a dismissal of the petition or to an acquittal of the charge.

In glossing over this significant distinction, the District Ccourt overlooked the recent decision of this Court in *United States v. Martin Linen Supply Co.*, ___ U.S. ___, 97 S. Ct. 1349, 21 Cr. L. 301 (decided April 4, 1977).[8] While that case is factually distinguishable, and while the Court there reaffirmed the principle that a verdict of acquittal could not be reviewed on error or otherwise without putting a defendant twice in jeopardy and thereby violating the Constitution, it emphasized that:

[8] For two other recent decisions of this Court concerned with the double jeopardy principle in the context of government appeals under facts quite different then those presented in the case at bar, see *Lee v. United States*, ___ U.S. ___, 97 S. Ct. 2141, 21 Cr. L. 3113 (decided June 13, 1977) and *Finch v. United States*, ___ U.S. ___, 97 S. Ct. 2909, 21 Cr. L. 3210 (decided June 29, 1977).

"What constitutes an 'acquittal' is not to be controlled by the form of the judge's action . . . rather, we must determine whether the ruling of the judge whatever its label *actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.*" 97 S. Ct. 1354. (Emphasis added).

In the case at bar the action of the master clearly does not represent a resolution of some or all of the factual elements of the offense charged. Rather, he merely makes proposals or recommendations to the juvenile court judge. These proposals, with or without exceptions filed thereto, may be adopted by the court. In the absence of exceptions, the court may remand the case to the master for a further hearing, or, on its own motion, may schedule and conduct a hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. In any event, the court is free to reject the recommendations of the master. Thus, under the Maryland system, the resolution of the factual elements is made by a juvenile judge and not by the master. Therefore, as the proposals of the masters do not constitute acquittals or dismissals of the petition, they do not stand as obstacles to the proposition that the hearing which begins with the master and ends with the juvenile judge is one continuous uninterrupted proceeding in which the juvenile is placed once in jeopardy on the charge of delinquency.[9] It follows that the juvenile court judge's continuing jurisdiction over

[9] Alternatively, the argument can be conceptualized on the basis that findings of facts made by a judge at a hearing on the record upon exceptions filed by the state do not represent supplemental findings under *Jenkins* because the masters findings are mere proposals which are not to be supplemented, but are to be adopted or rejected in whole or in part. The judges findings are the first and only legally binding findings made in the case, and thus the hearing before the master followed by the hearing upon exceptions constitutes one single jeopardy.

the case which involves, *inter alia,* a hearing before him upon exceptions filed by the State and an order following the master's conditional finding and order of dismissal do not expose the juvenile to double jeopardy.

CONCLUSION

In summary, Appellants urge that the District Court erred in its holding that jeopardy attaches at the hearing before the juvenile master when the State begins to offer evidence. In addition, assuming the attachment of jeopardy at the master hearing, the Appellants further submit that the district court erred when it held that the Double Jeopardy Clause is violated because jeopardy does not continue until a final adjudication by the judge. On the contrary, it is respectfully submitted that the aforegoing Maryland statutes and rules governing the right of the State to except to the findings and recommendations of the juvenile master in order to seek review before the judge of the juvenile court do not violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Accordingly, the decision of the District Court of Three Judges for the District of Maryland must be reversed and judgment entered for Appellants.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,

Appellants,

v.

DONALD BRADY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLEES

Of Counsel:

Michael S. Elder
Phillip G. Dantes
Karen L. Gilbert
Bruce A. Gilmore
Victoria A. Salner
Judith J. Shur
Gail R. Smith
Forrest R. Foss
Janet D. Webb
Evelyn A. Darden
Howard Margulies
Henry R. Abrams

Peter S. Smith*
Adrienne E. Volenik
Maryland Juvenile Law Clinic
500 West Baltimore Street
Baltimore, Maryland 21201

Attorneys for Appellees

*Court-appointed Attorney

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

Page

BOOKS

LAW REVIEW ARTICLES

Page

REPORTS

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,

Appellants,

v.

DONALD BRADY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLEES

OPINION BELOW

The Memorandum and Order of the district court is reported at 436 F. Supp. 1361.[1]

JURISDICTION

The Memorandum and Order of the court below was filed on September 16, 1977. See Appendix (hereinafter

[1]A related case involving the identical appellees and a body of evidence which, in its entirety, is part of the record in the instant case, is reported as ***Aldridge v. Dean***, 395 F. Supp. 1161 (D. Md. 1975). The relationship of ***Aldridge*** to the instant case is discussed *infra*, at 7-8, 11-12.

"A.") at 6. That court's judgment, dated September 19, 1977, was filed on September 20, 1977 (A.6, 56). This Court's jurisdiction is invoked under 28 U.S.C. §1253 (1970).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor s' all be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §3-813 (1977 Cum. Supp.)

> (a) The judges of a circuit court, and the Supreme Bench of Baltimore City, may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals. After July 1, 1978 the judges of the Circuit Court of Prince George's County may not appoint or continue the appointment of masters for juvenile causes. The standards expressed in §3-803, with respect to the assignment of judges, are applicable to the appointment of masters. A master, at the time of

> his appointment and thereafter during his service as a master, shall be a member in good standing of the Maryland Bar. This subsection does not apply to a master appointed prior to June 1, 1971, who is approved by the judge of the circuit court exercising juvenile jurisdiction.
>
> (b) If a master is appointed for juvenile causes, he is authorized to conduct hearings. These proceedings shall be recorded, and the master shall make findings of fact, conclusions of law, and recommendations as to an appropriate order. These proposals and recommendations shall be in writing, and, within 10 days after the hearing, the original shall be filed with the court and a copy served upon each party to the proceeding.
>
> (c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.
>
> (d) The proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court. They shall be promptly reviewed by the court; and in the absence of timely and proper exceptions, they may be adopted by the court and appropriate orders entered based on them. Detention or shelter care may be ordered by a master pending court review of his findings, conclusions and recommendations.
>
> (e) If the court, on its own motion and in the absence of timely and proper exceptions, decides not to adopt the master's findings, conclusions, and recommendations, or any of them it shall conduct a de novo hearing. However, if all parties and the court agree, the hearing may be on the record.

Maryland Rules of Procedure, Rule 911 (1977)

a. *Authority*

1. Detention or Shelter Care.

A master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters

A master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. *Report to the Court.*

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers).

c. *Review by Court if Exceptions Filed.*

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party

other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. *Review by Court in Absence of Exceptions.*

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions.

QUESTION PRESENTED

Do Ann. Code Md., Cts. & Jud. Proc. Art., §3-813(c) (1977 Cum. Supp.) and Ann. Code Md., Md. R. P., Rule 911.c (1977), to the extent that they permit the State of Maryland to except to a juvenile court master's finding of non-delinquency and try the juvenile a second time before the juvenile court judge, violate the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment?

STATEMENT

A. Procedural History

This case was filed on November 25, 1974, pursuant to 42 U.S.C. §1983 (1970) alleging deprivation of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The appellees brought the action on behalf of themselves and other similarly situated persons pursuant to Fed. R. Civ. P. 23.[2] Since appellees sought to have declared unconstitutional a rule legislative in nature,[3] and to enjoin a state officer from enforcing a policy of state wide application,[4] the case was filed pursuant to 28 U.S.C. §2281 (1970).[5] The thrust of appellees' complaint

[2]Appellees agree with appellants that the action of the court below granting appellees' request for class certification prevents the case from becoming moot. Brief of Appellants at 7 n.4. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Zablocki v. Redhail*, - U.S. -, 98 S. Ct. 673 (1978); *Satterwhite v. City of Greenville, Tex.*, 557 F.2d 414 (5th Cir. 1977), *rehearing en banc granted*, (Nov. 1, 1977). Moreover, wholly aside from the effect on mootness of the various intervenors, *see* 436 F. Supp. at 1362-63, the original plaintiffs in the case had not received all the relief to which they were entitled prior to the decision of the court below. See Plaintiffs' Memorandum in Response to Motion to Dismiss, filed in the court below on December 8, 1975, at 15-22.

[3]*See Roscoe v. Butler*, 367 F. Supp. 574, 575-76 (D. Md. 1973).

[4]*Id. See also Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 92-95 (1935); *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n.2 (1972); *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 82 n.6 (1975); *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975); Ann. Code Md., Art. 10, §34 (1977 Cum. Supp.).

[5]28 U.S.C. §2281 has since been repealed. *See* Act of Aug. 12, 1976, Pub. L. No. 94-381, §1, 90 Stat. 1119. Section 7 of that law provides that it shall not apply to any action which had commenced on or prior to the date of enactment.

was that a provision of the Maryland Rules of Procedure[6] denied them the right to be free of multiple prosecutions or punishments, in violation of constitutional double jeopardy protections, by permitting the State to prosecute them before a juvenile court judge at a *de novo* hearing after they had been found not guilty[7] of precisely the same offense[8] by a juvenile court master.

Simultaneously with the filing of the §1983 action which sought declaratory and injunctive relief, each of the appellees filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland.[9] Each alleged that he had been illegally restrained of his liberty because a juvenile court judge had found him guilty

[6]The Maryland Rules of Procedure are adopted by the state's highest court, the Court of Appeals, pursuant to Constitution of Maryland, Art. IV, §18A (1977).

[7]Under juvenile court rules, a child who pleads not guilty is said to "deny"; if he pleads guilty, he "admits". *See* Rule 907, Maryland Rules of Procedure (1977) which appears in Vol. 9B, Annotated Code of Maryland. All further references to rules will be to the Maryland Rules of Procedure, 1977 edition, unless otherwise indicated.

[8]At the time the complaint was filed, the offending provision was Rule 908.e (1971). The rule was subsequently amended, effective July 1, 1975, and became Rule 910 (1975 Cum. Supp.). *See* 2 Md. Reg. 967, 969-70 (1975). The nature of and reasons for the amendments are discussed *infra*, at 14-15. The rule was amended again, effective Jan. 1, 1977, with minor changes that have no bearing on the instant litigation. *See* 3 Md. Reg. 1385 (1976). The provision has been renumbered as Rule 911 (1977).

[9]The habeas corpus petitions were filed on November 26, 1974, one day after the instant case was filed. See the docket sheets prepared by the Office of Clerk, United States District Court for the District of Maryland, in Nos. T-74-1300-08, which are included in Vol. I of the original record in this Court.

and sentenced him to either probation or incarceration following a *de novo* trial which took place because the state's attorney had excepted to the results of an earlier trial in which a juvenile court master had found him to be not guilty.[10] The habeas cases were filed in addition to the §1983 case because neither action alone could obtain the full relief which the appellees desired. *Cf. Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The instant case and the companion habeas corpus litigation had their genesis in lengthy state court proceedings which commenced in 1972. Since that litigation has been the subject of major discussion and analysis by both the courts and the parties in the federal cases,[11] a brief summary of that history is helpful.

---

[10]In the cases of three of the appellees, the habeas corpus petitions were filed prior to the *de novo* hearings before the judge but after the state's attorney had filed exceptions to the juvenile court masters' determinations that the appellees were not guilty. By agreement reached between counsel and the juvenile court, the *de novo* hearings in those three cases were delayed pending the outcome of the federal court litigation. See the transcript of proceedings in the instant case and the companion habeas corpus cases held on March 18, 1975, at 270. The testimony of witnesses in the instant case was taken on March 17-18, 1975, April 7, 1975, and April 19, 1976. The 1975 testimony is contained in three separate volumes, all of which are consecutively numbered from 1-415. The 1976 testimony is in a fourth volume which is separately numbered from 1-46. Excerpts from the transcripts have been reproduced in the Appendix.

When references are made to portions of the transcripts which have not been reproduced in the Appendix, the 1975 transcripts will be referred to as "T.I.", and the 1976 transcript will be referred to as "T.II.".

[11]See the opinion of the court below, 436 F. Supp. at 1366; *Aldridge v. Dean*, 395 F. Supp. 1161, 1165-69, 1172 (D.Md. 1975); Brief of Appellants at 16, 17.

The state litigation commenced when a juvenile respondent, William Anderson, was tried and found not guilty before a master of the Baltimore City juvenile court.[12] The state's attorney filed written exceptions to the master's findings and requested a *de novo* hearing before the juvenile court judge. Following the filing of a motion to dismiss the exceptions, and after extensive briefing and argument on the allegation that Anderson was threatened with being placed twice in jeopardy for the same offense, the juvenile court judge ruled that double jeopardy protections apply to juvenile court proceedings,[13] and that those protections are violated when the state seeks a *de novo* trial before the juvenile court judge after having lost at a trial before the master.[14] *Matter of Anderson*, No. 158187 (Cir. Ct. of Balto. City, Div. for Juv. Causes, Aug. 1, 1973).

On appeal, the Court of Special Appeals of Maryland reversed. *Matter of Anderson*, 20 Md. App. 31, 315 A.2d

---

[12]The correct name of the Baltimore City juvenile court is the Circuit Court of Baltimore City, Division for Juvenile Causes (hereinafter referred to as the "juvenile court") (T.I.18).

[13]The juvenile court judge rendered his opinion nearly two years before this Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975), which extended double jeopardy protections to juveniles. At the time he made that ruling, existing Maryland case law rejected the application of double jeopardy principles to juveniles under the theory that juvenile courts provided civil remedies and did not punish one for the commission of a crime. *See Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958); *Johnson v. State*, 3 Md. App. 105, 238 A.2d 286 (1968).

[14]Since the juvenile court judge's memorandum opinion, dated August 1, 1973, is not reported, appellees have lodged a copy with the Office of the Clerk for the convenience of this Court.

540 (1974).[15] Assuming for purposes of its decision that juvenile proceedings fell within the ambit of double jeopardy protections, *see* 20 Md. App. at 43-44, 315 A.2d at 547, the court concluded that the entire process from the beginning of the master's trial[16] to the end of the judge's *de novo* hearing constituted one continuous jeopardy. Thus, even if the initial jeopardy attached at the commencement of the adjudicatory hearing before the master, the court ruled that the action of the judge in the second hearing did not "put the child twice in jeopardy because there has been no culmination of the first jeopardy." 20 Md. App. at 47, 315 A.2d at 549 (footnote omitted).

On certiorari review by the Court of Appeals of Maryland, the intermediate appellate court's decision was affirmed, although on different grounds. Whereas the Court of Special Appeals had assumed that jeopardy attached at the beginning of the master's hearing and simply continued, the Court of Appeals concluded that the "hearing before a master is not such a hearing as places a juvenile in jeopardy." *Matter of Anderson*, 272 Md. 85, 106, 321 A.2d 516, 527 (1974). Central to the court's position was the view that a master is a ministerial officer, not a judicial

[15]At the time the State appealed *Anderson*, it also appealed the dismissal of several exceptions that had been pending during the course of the *Anderson* trial court litigation and that were dismissed by the trial judge after he rendered his decision. Two of the parties who joined Anderson in the Court of Special Appeals, Donald Brady and Michael Epps, are two of the appellees in the instant case.

[16]In Maryland, the juvenile court trial is known as the adjudicatory hearing. *See* Ann. Code Md., Cts. & Jud. Proc. Art., §3-819 (1977 Cum. Supp.); Rule 914. All further references to statutues will be to the Annotated Code of Maryland, Courts and Judicial Proceedings Article, 1977 Cumulative Supplement, unless otherwise indicated.

officer, and is entrusted with none of the judicial powers of the state.[17]

After the parties unsuccessfully sought review in this Court,[18] appellees filed the instant case and the companion habeas corpus petitions.[19] By agreement of the parties, hearings were first held in the habeas corpus cases.[20] The parties further agreed that all evidence taken in the habeas cases would be included as part of the evidence in the

[17]At fn.136 *infra*, appellees point out that the Maryland Court of Appeals has been inconsistent on the issue of whether a master is or is not a judicial officer.

[18]Three of the juveniles in the *Anderson* litigation filed an appeal in this Court which was dismissed for want of a substantial federal question. *Epps v. Maryland*, 419 U.S. 809 (1974). Anderson, who was represented by other counsel, filed a petition for writ of certiorari which was denied. *Anderson v. Maryland*, 421 U.S. 1000 (1975).

[19]During the time that appellees Brady and Epps were concluding their state court appeals and preparing their federal court cases, the State of Maryland filed juvenile court petitions charging the remaining seven appellees, Aldridge, Campbell, Fenwick, Love, McLean, Stewart, and Witherspoon. See plaintiffs' exhibits (hereinafter "P.Ex.") 1(A), 3(F), 5(N), 6(U), 6(V), 7(N), 8(S), and 9(V). As a result of subsequent actions adverse to their double jeopardy interests, see *infra*, at 17-20, they joined the federal court litigation.

All of plaintiffs' exhibits filed in the court below, except for Nos. 72-74, are included in Vol. VII-X of the original record in this Court. P.Ex. 72-73 are included as attachments to pleading no. 34, and P.Ex. 74 is included as an attachment to pleading no.37, all of which are located in Vol. II of the original record in this Court. In addition, P.Ex. 39-42 are reprinted in full at A.29, 32, 33, and 34, respectively. P.Ex. 46 and 49 are reprinted in part at A.35 and 39, respectively.

[20]By letter of April 17, 1975, Judge Roszel Thomsen, who presided at the habeas corpus hearings and was originally a member of the three-judge district court in the instant case, informed counsel that the three judges were of the opinion that the habeas cases should proceed to final determination before the three-judge court commenced hearings.

instant case, subject to any rulings by the three-judge court respecting relevancy (T.I.2).[21]

Following the presentation of extensive evidence in the habeas cases,[22] the court rendered an opinion on June 12, 1975, concluding that the rights of a juvenile are violated under the Fourteenth Amendment when,

> after a master has held an adjudicatory hearing and has announced his finding "charge not sustained", the state is allowed to file exceptions to the finding of the master and to obtain a de novo adjudicatory hearing before a judge on the question of whether the juvenile is delinquent by reason of the alleged act. *Aldridge v. Dean*, 395 F. Supp. 1161, 1172 (1975).

In accordance with its opinion, the court entered orders on June 24, 1975, granting the petitions for writs of habeas corpus for the six appellees who were then improperly in custody as a result of being placed in jeopardy a second time.[23] The respondents in the habeas cases took no appeal.[24]

[21]A copy of a joint stipulation of counsel to that effect is included in the pleading file in each of the nine habeas cases. See pleading no. 8 in Vol. I of the original record in this Court. The three-judge court did not exclude any of the evidence that had been introduced in the habeas corpus cases. Hence, the record in the instant case consists of all evidence taken in both the habeas and the three-judge court cases. See the opinion of the court below, 436 F. Supp. at 1363.

[22]That evidence is discussed *infra*, at 23-30, 68-76.

[23]The habeas petitions of the three juveniles who had not yet been tried a second time were denied without prejudice to refile them if the State should press for second prosecutions.

[24]In conformity with normal habeas corpus practice, the persons named as respondents in the habeas cases, unlike the appellants in the instant case, were the persons having immediate custody of the appellees. The Maryland Office of the Attorney General, however, served as counsel and handled all of the proceedings for the appellants in the instant case and for the respondents in the habeas corpus cases.

Shortly before the habeas corpus cases were decided, the Maryland General Assembly passed,[25] and the Governor signed,[26] a new juvenile causes statute[27] which became effective on July 1, 1975.[28] Unlike the statute which it replaced,[29] the new juvenile law included a provision, §3-813(c), which authorizes any party[30] to except to the findings of the master and seek a hearing *de novo* or on the record before the judge.[31] That section provides in pertinent part:

> (c) Any party, in accordance with the Maryland Rules, may file written exceptions to any or all of the master's findings, conclusions, and recommendations, but shall specify those items to which he objects. The party who files exceptions may elect a hearing de novo or a hearing on the record before the court. The hearing shall be limited to those matters to which exceptions have been taken.

[25]On April 5, 1975.

[26]On May 15, 1975.

[27]1975 Md. Laws, Ch. 554.

[28]*Id.* at §5.

[29]Cts. & Jud. Proc. Art., §§3-801-42 (1974).

[30]The new statute defined "party" to include "the petitioner". *See* §3-801(q). Another section of the statute made clear that "the petitioner" in a delinquency proceeding is the state's attorney. *See* §3-812(b).

[31]The former juvenile causes statute, see *supra*, at fn.29, did not speak to the issue of the right of any party to except to the findings of masters. Indeed, it contained no reference whatever to the use of masters in juvenile court. As a consequence, the appellees in their original complaint in the instant case and the petitioners in the habeas cases confined their legal attack to the relevant provision in the Maryland Rules of Procedure.

After the legislature passed the new statute, the Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals drafted new juvenile court rules to become effective simultaneously with the new statute. A draft of those new rules was published on June 11, 1975.[32] The text of proposed Rule 910.e tracked the new statute, providing, *inter alia*, that "the party who files exceptions may elect a hearing de novo or a hearing on the record."[33] The day after the draft rules were published, the habeas corpus cases were decided. *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975).

Two weeks later, a revised draft of the rules was published,[34] accompanied by an order of the Court of Appeals of Maryland adopting them, effective July 1, 1975. Subsection 910.e was substantially redrafted to provide, in pertinent part:[35]

> [[The]] *A* party who files exceptions, *other than the State*, may elect a hearing de novo or a hearing on the record. *If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection.*

In addition, other portions of Rule 910 were amended to insert the word "proposed" immediately before the phrase

[32] *See* 2 Md. Reg. 909 *et seq.*

[33] *Id.* at 912.

[34] *See* 2 Md. Reg. 967 *et seq.*

[35] *Id.* at 970. The words in double brackets were removed from the June 11 draft and the words that are italicized were added.

"findings of fact, conclusions of law, recommendations."[36]

On July 17, 1975, appellants moved to dismiss the instant case as moot, alleging that the alteration in the juvenile court rules caused them to conform to the opinion in *Aldridge v. Dean.*[37] Appellees then obtained leave to file a supplemental complaint in which they alleged that the offending rule had been amended but was still unconstitutional for the same reasons previously urged. They further alleged that the new statutory provision which permitted the state's attorney to request a *de novo* hearing before the juvenile court judge also violated their double jeopardy rights.

After additional evidence was taken in April and May, 1976, primarily for the purpose of updating the record developed at the habeas corpus hearing the previous year, the court below unanimously ruled unconstitutional the provisions of §3-813 and Rule 911.c,[38] to the extent that those provisions permit the State to except to a master's

[36] See the discussion *infra*, at 56-57. The only other change made that is relevant to the instant litigation was in subsection 910.f, which provided that the judge could, on his own motion, order a hearing. The June 11 draft permitted the hearing to be *de novo*, while the final version permitted additional evidence to be introduced only if the parties raised no objections.

[37] Inexplicably, appellants also stated in their motion to dismiss that the new rules were amended to conform with the new statute. In fact, as the court below notes, the rule is in direct conflict with §3-813(c), since the former prohibited *de novo* hearings before the judge when review is requested by the state or initiated on the judge's own motion, while the latter provision had no such restriction. 436 F. Supp. at 1365. See discussion *infra*, at fn.39.

[38] As previously noted, see *supra*, at fn. 8, revisions in the juvenile court rules, effective January 1, 1977, resulted in Rule 910 becoming Rule 911.

adjudicatory or dispositional findings and seek a new hearing before a juvenile court judge.[39] Notice of appeal to this Court was filed on October 14, 1977, and probable jurisdiction was noted on November 28, 1977. 98 S. Ct. 501.

B. Facts

1. The Appellees

Between December, 1972, and August, 1974, juvenile court petitions were filed against the original nine appellees[40] charging them with a variety of offenses which,

[39]While noting that the statute and rule conflict respecting the *de novo* - on the record issue, the court below viewed the rule as controlling since it was approved by the Court of Appeals of Maryland after the new statute was passed by the legislature and signed by the Governor. Under Maryland case law, a rule which conflicts with a statute will prevail if it was adopted subsequent to the passage of the statute and is within the rule making power of the Court of Appeals as provided in the Constitution of Maryland, Art. IV, §18A (1977), and §1-201 (1974). *See County Fed. S. & L. v. Equitable S. &L.*, 261 Md. 246, 274 A.2d 363 (1971). Likewise, a statute enacted subsequent to a rule and contrary to it would prevail. *See Hensley v. Bethesda Metal Co.*, 230 Md. 556, 188 A.2d 290 (1962). While the reasoning of the court below as to why the rule prevails is logical and counsel have expressed agreement with that position, the matter is not completely free from doubt since both the statute and the rule became effective on the same day, July 1, 1975. As explained *infra*, at 86-92 appellees believe that each version is equally unconstitutional. However, appellees fully support the order and judgment of the court below which operates against both the statute and the rule since, even if the rule does now prevail, if it were repealed the statute would become fully operational. *See Scott & Wimbrow v. Wisterco, Inv., Inc.*, 36 Md. App. 274, 281 n.3, 373 A.2d 965, 970 n.3 (1977). For this reason, appellees will demonstrate how the evidence and the relevant law condemn both the statute and the rule.

[40]See P.Ex. 1(A), 2(N), 3(F), 4(N), 5(N), 6(U), 6(V), 7(N), 8(S), and 9(V).

collectively, included destruction of property, breaking and entering, assault with intent to murder, possession of a deadly weapon, robbery, robbery with a deadly weapon, and simple assault.[41] Each appellee was tried before a juvenile court master,[42] and in each case except that of appellee Stewart, the master concluded at the end of the adjudicatory hearing that the charges were not sustained.[43] Stewart was found to have committed a delinquent act and was placed on probation.[44]

The State of Maryland filed exceptions which sought new trials before the juvenile court judge in each case except Stewart's where the request was for a new disposition hearing.[45] The basis for the State's exceptions varied. In the cases of appellees Brady, Epps, Love, McLean, and

[41]*Id.* See also P.Ex. 49. This exhibit summarizes, for each of the nine original appellees, 1) the date and nature of the alleged offense, 2) the date of the trial before the master and the master's name, 3) the names of the witnesses testifying before the master and the substance of that testimony, 4) the master's finding and the basis for it, and 5) the name of the assistant state's attorney who filed exceptions to the master's finding and his basis for filing the exceptions.

[42]Appellees Aldridge and Campbell were tried together as co-respondents. See *Id.* at 8.

[43]*Id.* at 3, 4, 8, 12, 13, and 15. At the conclusion of the adjudicatory hearing (trial) in a delinquency case, findings are made only respecting the commission of a "delinquent act," which is defined as an act which would be a crime if committed by an adult. *See* §3-801(k). If the delinquent act is found to have been committed, a separate disposition hearing is held, unless waived by the parties, to determine whether the respondent is a "delinquent child." Under Maryland law, a "delinquent child" is a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation. *See* §§3-801(1), 3-820.

[44]See P.Ex. 8(M), 49 at 7.

[45]See P.Ex. 1(I), 2(E), 3(A), 4(I), 5(D), 6(N), 7(G), 8(K), and 9(N).

Witherspoon, the state's attorney was dissatisfied with the master's view on the weight of the evidence. In *Brady* the state's attorney disagreed with the master's doubts concerning the reliability of an eye witness identification.[46] In the *Epps* case, the state's attorney disagreed with the master's conclusion that the uncorroborated evidence of an accomplice was insufficient to demonstrate guilt.[47] The exception in the *Love* case was taken because the state's attorney believed that testimony of a police officer concerning an alleged confession given by the juvenile was sufficient to prove guilt.[48] In the *McLean* case, the state's attorney disagreed with the master's finding that the complaining witness' identification of the respondent was too hazy to permit a finding of guilt, especially since it lacked corroboration.[49] The exception in the *Witherspoon* case was taken because the state's attorney disagreed with the master's conclusion that testimony given by respondent's mother concerning papers her son signed at the police station created doubts concerning whether the respondent had made an intelligent waiver of counsel (A.42).[50]

In the remaining cases where the State filed exceptions from masters' not guilty findings, it was dissatisfied with legal rulings made by the masters. In the *Fenwick* case, the master concluded that the evidence did not support the

[46]See P.Ex. 49 at 15.

[47]The state's attorney also felt that a document should have been admitted and that the master should have given weight to testimony concerning it. *Id.* at 14.

[48]*Id.* at 12.

[49]*Id.* at 16. The *McLean* case is discussed in more detail *infra*, at 85-86.

[50]The *Witherspoon* case is discussed in more detail *infra*, at 83-85.

charge, noting that the State had filed the wrong charge. The state's attorney disagreed because, in his view, the master erred as a matter of law in concluding that associates, aiders, or abettors could not be charged as principals in connection with the offense in question.[51] In the *Aldridge* and *Campbell* cases, the state's attorney objected to the refusal of the master to allow him to call a certain witness in rebuttal since, in the master's view, that witness should have been offered as part of the State's case in chief.[52]

In the *Stewart* case, the master, after finding that the child had committed the offense, placed him on probation. In doing so, he was influenced by the fact that the victim had initiated the fight which resulted in the charges against Stewart while he was in Stewart's own home. The state's attorney excepted because he believed that Stewart used excessive force and that the offense may have been premeditated.[53]

Aldridge, Campbell, Fenwick, Witherspoon, and McLean were subsequently tried before the juvenile court judge who found them guilty[54] and committed all but Fenwick to a juvenile institution.[55] Fenwick was placed on probation.[56] Following an initial hearing before the judge,

[51]See P.Ex. 49 at 3.

[52]*Id.* at 9.

[53]*Id.* at 7.

[54]See P.Ex. 44 at 150, 45 at 40, 46 at 87, and 48 at 21.

[55]See P.Ex. 1(M), 3(J), 7(B), 9(A).

[56]See P.Ex. 5(A).

Stewart was ultimately committed to a juvenile institution.[57]

Since appellees Brady and Epps had been parties in the state court litigation,[58] the exceptions in their cases had been dismissed immediately after the juvenile court judge rendered his opinion in *Matter of Anderson.*[59] Following the decisions of the state appellate courts which reversed the trial court's decision, Brady and Epps immediately filed the instant action. During its pendency in the district court, the exceptions were not pressed.[60] Because appellees prevailed below, hearings before the juvenile court judge

[57]See P.Ex. 8(D). When Stewart appeared before the juvenile court judge on the exception hearing on June 20, 1974, the judge ordered that he be evaluated at a diagnostic institution and consequently postponed his ultimate decision until the child's evaluation was completed. See P.Ex. 47 at 27-28. When the report was completed on July 30, 1974, the hearing resumed, not before the judge but before Master Bernard M. McDermott who recommended that he be committed to a forestry camp. See P.Ex. 8(D). Why Stewart's exception hearing resumed before a master instead of before a judge is not clear, although the fact that the order of commitment was signed by a judge other than the one who regularly sat in the juvenile court (see P.Ex. 8(D) and T.I. 91-92) suggests that the regular judge may have been on vacation. The fact that the exception hearing was presided over by one master who, substituting for a judge, in effect, overruled the earlier decision of another master, is some evidence of the extent to which the difference between master and judge becomes blurred in practice. See the discussion *infra*, at 68-70.

[58]See *supra*, at fn.15.

[59]See P.Ex. 2(B), 4(E). The State's exceptions in *Brady* and *Epps* (see P.Ex. 2(E), 4(I)) had been filed while the *Anderson* case was pending before the juvenile court judge.

[60]See *supra*, at fn.10.

never occurred. For the same reason, the second hearing of appellee Love never took place.[61]

2. The Baltimore City Juvenile Court, Its Personnel, and Its Operation

While the statute and rule in issue are unconstitutional when examined in conjunction with other provisions of the juvenile code and rules, their illegality is confirmed by viewing them in the context of the day-to-day operation of the juvenile court. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886).[62] In order to give the courts that would pass on the issues in this case full opportunity to understand how the juvenile court really operates, appellees developed an extensive record of testimonial and documentary evidence at the 1975 and 1976 hearings.[63] In particular, evidence was adduced to reveal the juvenile court master's true role and his relationship to the juvenile court judge in a large urban court system in which masters are responsible for processing the major portion of the juvenile delinquency

[61]In its opinion, the court below permitted the intervention of Eugene Fields. *See* 436 F. Supp. at 1362. Fields filed a motion for leave to intervene on May 21, 1976 (A.5), alleging in his complaint that at an adjudicatory hearing before a master, he was found not guilty. Thereafter the state's attorney filed exceptions to the findings and requested a hearing before the juvenile court judge. See intervenor's complaint at 2, which appears at pleading no. 38 in Vol. II of the original record in this Court.

[62]Moreover, an examination of the contested statute and rule as applied will demonstrate that the unconstitutional provisions cannot be saved by permissible judicial interpretation. *See generally Driscoll v. Edison Light & P. Co.*, 307 U.S. 104, 114-15 (1939). Additionally, an examination of actual practice reveals that possible facial unconstitutionality does not dissolve when the provision in question is applied. *See generally United States v. Raines*, 362 U.S. 17 (1960).

[63]See T.I. 4-5. At the 1975 hearings, appellees presented the testimony of the Baltimore City juvenile court judge (T.I. 91-146), a

(continued)

case load.[64] Since appellees discuss in the argument[65] relevant aspects of the juvenile court's operation as revealed by the evidence, only the basic framework will be discussed here.[66]

(footnote continued from preceding page)

Montgomery County juvenile court judge (T.I. 146-161), two Baltimore City juvenile court masters (T.I. 3-16, 225-67, 272-84), the Baltimore City juvenile court clerk (T.I. 16-89, 164-225, 363-68), the Chief of Research for the State Juvenile Services Administration (T.I. 400-13), a law student who had assembled statistical materials (T.I. 285-330), and the mothers of two of the appellees (T.I. 330-51). In addition, appellees introduced 49 exhibits (P.Ex. 1-35, 37-50 (there was no P.Ex. 36)). At the 1976 hearing appellees presented further testimony of the juvenile court clerk (T.II. 2-46). They also prepared, and appellants stipulated to, written testimony of all of the present juvenile court masters (A. 42-44, 50-55), the Chief of the Juvenile Division, Office of the State's Attorney for Baltimore City (A.5 and Vol. II of the original record in this Court at pleading no. 34) and the Chief of Research for the State Juvenile Services Administration (see A.5 and Vol. II of the original record in this Court at pleading no. 37). Finally, appellees introduced 26 additional exhibits (P.Ex. 51-76).

[64]*See* Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L. J. 3 (1967).

[65]See *infra*, at 68-76.

[66]In their Brief at 8-10, appellants set forth under the sub-heading "Facts" a brief discussion of the make-up of the juvenile court judge's case load, certain procedures that occur at hearings before the master, and the mechanism for taking exceptions to a master's findings. Although the statement is essentially accurate as far as it goes, it reveals little relevant information beyond that which can be gleaned from a cursory examination of the juvenile statute and rules. Appellants ignore the great bulk of virtually uncontested testimony and documentary evidence, which "puts flesh on the bare bones of the statute and rules," *Aldridge v. Dean*, 395 F. Supp. at 1168, and thereby makes more understandable the underlying constitutional issues. In addition to the facts and discussion in this Brief, *see Aldridge v. Dean* which makes 28 findings of fact (395 F. Supp. at 1163-66, 1169-71), all of which are based on and supported by the evidence which is part of the original record in the instant case. See *supra*, at fn.21.

a. The Juvenile Court's Personnel and Their Duties

The juvenile court is composed of one judge and seven full time masters (T.I. 21-23; T.II.4).[67] They are assigned to hear delinquency and non-delinquency cases[68] (T.I. 228). In delinquency cases, the judge and masters preside at a variety of hearings which include the initial arraignment hearing (T.I. 51), the detention hearing (T.I. 54-57),[69] the adjudicatory hearing (T.I. 66)[70] and the disposition hearing (T.I. 69-76).[71] Either the judge or the masters may conduct any one of these hearings (T.I. 21, 101-02, 228). In addition, the judge presides at all hearings in which the State requests a waiver of jurisdiction to the criminal court.[72] In addition to hearing cases that are set in before

[67]In addition to Baltimore City, the following counties in Maryland employ masters in their juvenile courts: Wicomico, Baltimore, Harford, Anne Arundel, Carroll, Howard, Prince George's, Charles, St. Mary's. *See* JUVENILE SERVICES ADMINISTRATION, MD. DEP'T OF HEALTH & MENTAL HYGIENE, DIRECTORY (1977) at 5, 9, 10, 13, 15, 16, 20, 23.

[68]The juvenile causes statute also gives the juvenile court jurisdiction over children in need of supervision and children in need of assistance. *See* §3-804(a). Those two categories are defined in §§3-801(f) and 3-801(e), respectively.

[69]*See* §3-815(c); Rule 912.

[70]See *supra*, at fn.16.

[71]See *supra*, at fn.43.

[72]*See* §3-817; Rule 913. Prior to September, 1975, waiver hearings were set in before the masters as well as the judge (T.I. 63). Commencing approximately September 17, 1975, the juvenile court judge instructed the clerk to schedule all waiver cases before him (T.II. 10). Since January 1, 1977, court rule requires that all waiver cases be heard by the judge. *See* Rule 911.a.2.

him originally and those that are set in by way of exception (T.I. 101), the judge is responsible for the day-to-day administration of the juvenile court (T.I. 94-94B, 136-38).

b. The Assignment of Cases

Cases are assigned to the judge and masters by the juvenile court clerk. Rule 904.b. Neither the prosecution nor the defense plays any role in such assignments (T.I. 87; T.II. 13).[73] While the number and kind of delinquency cases scheduled before the judge for trial have varied,[74] the judge has customarily been assigned cases in which it is anticipated that an exception would be taken regardless of the outcome (T.I. 87, 102), and which involve more serious offenses such as armed robbery (A.45; T.I. 101-03). However, due to the volume of cases involving serious acts of violence, such cases are spread fairly equally among the masters and the judge (T.I. 103).

c. The Size and Distribution of Case Loads

Collectively, the judge and seven masters of the juvenile court hear many thousands of cases each year. In calendar year 1974, over twelve thousand hearings were held in delinquency cases.[75] The figures for calendar year

[73]The statutes of several states and provisions of certain model juvenile court acts provide that if a master can be assigned to preside at an adjudicatory hearing, the juvenile has the option of deciding whether or not his case will be tried before him or before the judge. Other states, like Maryland, do not give the child that right or choice. See the *Amicus Curiae* Brief filed by the National Juvenile Law Center, at 20-22.

[74]Compare T.I. 87 with T.II. 13.

[75]See P.Ex. 39, 40 at A.29, 32; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 14).

1975 showed comparable case loads.[76] The vast majority of those hearings was held before the seven masters. The statistics for calendar year 1974 show that masters presided at 11,253 delinquency hearings and the judge presided at 778.[77] Isolating out only adjudicatory hearings from that total, the masters presided at 5,345 hearings and the judge at 327.[78]

d. The Adjudicatory Hearing

There is essentially no difference in an adjudicatory hearing conducted before a master and such a hearing conducted before a judge.[79] Further, the description of the adjudicatory hearing given by one of the juvenile court

[76]See P.Ex. 71, 73, 74.

[77]See P.Ex. 39, 40.

[78]*Id.* The data compiled for calendar year 1974 was prepared through time consuming hand counting procedures by appellees' counsel in order to reveal the full scope of the master's involvement in the trial of delinquency cases. The method by which this data was accumulated is explained at T.I. 288-90. Since the data compiled for calendar year 1975 was obtained from existing materials, it does not include a breakdown of case load between master and judge. Since the number of masters in the juvenile court has remained the same, the breakdown of case load between master and judge would be roughly the same for the 1975 calendar year covered by P.Ex. 71, 73, and 74.

[79]*See Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 17). The only difference noted by the *Aldridge* court was that the proceedings before the judge were recorded by a court reporter. *Id.* Effective July 1, 1975, the juvenile code was amended to require masters' proceedings to be recorded. *See* §3-813(b). A tape recorder is used for this purpose (A.44, 55).

masters[80] reveals that it is little different from a criminal trial:

> The delinquency cases, the order in which they're called is determined by the State's Attorney. He would indicate what cases he is calling and my Bailiff would take the folder containing the Clerk's file from the stack of other folders which may be, have been referred to me, on that day. He would have previously given to me one copy of that Petition, which we usually call the note copy of the Petition, to inform me of what the charge is. He would read the Petition. The State would present its case. The witnesses would be called. They would be individually sworn. They would be subjected to direct testimony and then cross-examination. At the conclusion of the State's case, the defense, normally, makes a motion to dismiss. If it's denied, the defense would then present its case by presenting witnesses and have them sworn, individually, and at the conclusion of the defense's case, we would hear argument and after argument, reach a decision about whether the charge was or was not sustained.
>
> Then, I would, in reaching the conclusion, announce my finding to the persons who are there at that time, explaining the reasons why I reached the conclusions that I did and, usually, referring back to the evidence which I heard and relating it to the elements of the offense and, I usually terminate the adjudicatory Hearing by announcing that I find the delinquent act to be sustained. (A.11-12).

[80]Another juvenile court master who read that description testified to its accuracy. He further stated that, based on his observations of how all of the other masters conducted their hearings when he appeared before them as a public defender, the description accurately portrayed the manner in which the other masters conducted their hearings (A. 52-53). *See Breed v. Jones*, 421 U.S. 519, 529 n.11 (1975).

During the course of the adjudicatory hearing, the master observes the demeanor of the witnesses and utilizes those observations in assessing credibility (A.12; T.I. 273). The rules of evidence utilized in adult criminal proceedings are applied and the master makes rulings on evidentiary objections (A.13). In making findings on the issue of innocence or guilt, the standard of guilt beyond a reasonable doubt is applied (A.13).[81] At the conclusion of the adjudicatory hearing, the master announces his findings. Rather than use words such as "delinquent act sustained," more familiar words are chosen such as

> I find you did commit the act you are charged with. If this were an adult court, I would announce, you're guilty of the charge, I find you guilty. (A.13).[82]

e. The Judge's Review of the Master's Findings

In the relatively few cases which the judge hears on exception,[83] the parties present new evidence or, if the exception hearing is on the record, evidence that was presented to the master.[84] However, in the vast bulk of cases—those in which no exceptions are taken—the masters' findings and recommendations are ruled on by the

[81]*See* §3-819(b); *In re Winship*, 397 U.S. 358 (1970).

[82]The manner in which the parent and child perceive the master at the hearing and their reactions to the master's findings are discussed *infra*, at 68-70.

[83]In calendar year 1974, the judge held 219 hearings as a result of exceptions taken by a party. See P.Ex. 40 at A.32. In that same year masters held 11,253 hearings. See P.Ex. 39 at A.29.

[84]But see the discussion *infra*, at 87 and fn. 172.

judge *ex parte* and *in camera* (T.I. 105, 119, 150).[85] In passing on the recommendations of a master, the judge has before him essentially no information describing the evidence that was developed at the trial before the master.[86] His capacity to review the proposed orders that he receives from the masters is further complicated by the high volume of orders he signs each year. For calendar year 1974, the judge signed 9,842 orders in delinquency cases.[87] This lack of information, combined with the high volume of proposed orders, results in perfunctory review by the judge and virtually automatic approval of the masters' recommendations.[88]

f. Actions Taken by Masters in Which the Custody of the Child is Affected Either Prior to or in Total Absence of Review by the Judge

In many instances, actions taken by the masters which affect the child's custody are implemented prior to review by the judge or are never reviewed at all. If, at the conclusion of a detention hearing, the master decides to

[85]*See Matter of Brown*, 13 Md. App. 625, 633, 284 A.2d 441, 445 (1971), where the court referred to the judge's review of masters' findings and recommendations as being "frequently conducted *ex parte* and frequently conducted *in camera*. . . ."

[86]The overwhelming evidence in the record that supports these conclusions is analyzed *infra*, at 72-76. *See Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 23).

[87]See P.Ex. 41, set forth at A.33; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 15). This total does not include orders the judge signed in connection with children who are involved in the 1,481 non-delinquency hearings. See P.Ex. 43.

[88]See *infra*, at 76-78; *Aldridge v. Dean*, 395 F. Supp. at 1171 (Findings 24 and 25).

release the child pending further hearing, that decision is not reviewed by the judge (T.I.59).[89] Similarly, if the master, at the conclusion of an adjudicatory hearing, finds that the child committed the act alleged but postpones the disposition hearing until a later date,[90] his decision to release the child pending the disposition hearing is not reviewed by the judge (A.19-20; T.I.199, 281).[91] If a child has been detained pending an adjudicatory hearing and the master finds at the conclusion of the hearing that the charge is not sustained, the child is normally released immediately without waiting for the judge to sign an order ratifying the finding (A. 18-19; T.I.278).[92]

In two instances, the master is given explicit power to enter an order. Pursuant to Rule 911.a.1, he is authorized to order detention or shelter care.[93] He is also authorized by statute to order the detention of a child between the time that he enters his findings at the conclusion of the

[89]In calendar year 1974, 652 such decisions, all unreviewed by the judge, were made. See P.Ex. 42 at A.34.

[90]The child has the right to a minimum of five days notice for each hearing except a detention hearing. *See* Rule 910.c. Moreover, the master may wish to postpone the disposition hearing pending a medical evaluation or other investigation (T.I. 72, 235).

[91]*See Aldridge v. Dean*, 395 F. Supp. 1161, 1171 (D.Md. 1975) (Finding 27). In calendar year 1974, masters took actions of this type 1,122 times. See P.Ex. 42 at A.34.

[92]*See Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 27). The only exceptions would be where the child is being held on another charge or the State immediately excepts to the master's findings (T.I. 247-48).

[93]This rule was adopted by the Court of Appeals of Maryland one year after it rendered its decision in *Matter of Anderson. See* 2 Md. Reg. 967, 970 (1975). At the time of its adoption in 1975, the rule was designated Rule 910.a. See *supra*, at fn.8.

adjudicatory hearing and the time the judge signs the final order in the case. §3-813(d). The statute, which was enacted in 1977,[94] merely ratified existing practice (A.18; T.I.277).[95]

SUMMARY OF ARGUMENT

I. This Court has generously applied the protections of the double jeopardy clause of the Fifth Amendment of the United States Constitution to adult criminal proceedings. The clause clearly protects against the reprosecution of a criminal defendant on a charge for which he has either been convicted or acquitted. Its major focus is upon the risk, rather than the actuality of conviction, but it also precludes the imposition of a second punishment for a crime for which the defendant has already been punished. Juveniles accused of committing crimes have, since 1975, also been accorded the protections of the double jeopardy clause, and,

[94]1977 Md. Laws, Ch. 259.

[95]*See Aldridge v. Dean*, 395 F. Supp. 1161, 1171 (D.Md. 1975) (Finding 26). Since the judge may not sign the order ratifying the master's decision until the time allowed for a party to take an exception has run, *see In re Appeal No. 287*, 23 Md. App. 718, 329 A.2d 420 (1974), up to 15 days may go by before the order is signed. *See* Rule 911.b and c, which provide, respectively, that the master shall transmit his findings and recommendations to the judge within 10 days following the conclusion of the disposition hearing, and that a party has 5 days thereafter to except. Since the parties virtually always waive the master's written findings and recommendations (A.44, 53; T.II. 18-19), the normal time period which would be required to elapse before the judge signs the order would be 5 days. See P.Ex. 63 and the discussion *infra*, at 74-75.

therefore, cannot be subjected to the risk of multiple prosecutions and multiple punishments. *Breed v. Jones*, 421 U.S. 519 (1975).

II. Initial jeopardy attaches at an adjudicatory hearing before a master for two reasons. First, the proceeding is one in which the juvenile is subjected to the risk of being found guilty and punished. Second, the master is the trier of fact and, as such, hears evidence relevant to the question of a youth's guilt or innocence. Whatever his title, the role that the master actually plays clearly demonstrates that the adjudicatory hearing at which he presides is, in fact, the youth's trial. Hence, jeopardy must attach in that proceeding at the same point that it would in an adult criminal proceeding tried to a judge—when the court begins to hear evidence. These conclusions are supported by this Court's decision in *Breed v. Jones* in which a master presided over the adjudicatory hearing at which an initial jeopardy was held to attach.

III. A hearing before a juvenile court judge, either *de novo* or on the record, that occurs after a master has already determined the guilt or innocence of the child, places that child in jeopardy for a second time. That the master is not empowered to enter a final order is immaterial for purposes of invoking the protections of the double jeopardy clause. The master, for all practical purposes, resolves the issue of the child's innocence or guilt after listening to testimony, weighing the credibility of witnesses, and evaluating all evidence presented. The hearing, consequently, is procedurally very similar to an adult criminal trial. Indeed, it subjects the child and his family to the same personal strain, public embarrassment, and expense that an adult defendant

suffers in a criminal trial—the same pressures that, under the double jeopardy clause, ordinarily must be endured only once. *Abney v. United States*, 431 U.S. 651, 661 (1977). Additionally, review by the juvenile court judge is perfunctory because of the enormous case loads of the masters, the time consuming nature of the judge's other duties, and the scanty nature of the material the judge has before him when he is presented proposed orders for signature. Therefore, in nearly all cases, the judge accepts the master's recommendation without question. Further, a court order formalizing a finding of innocence or guilt is not necessary to confer the finality required to terminate initial jeopardy. *United States v. Ball*, 163 U.S. 662 (1896).

Even if a master's findings are not considered sufficiently final to terminate initial jeopardy, a second hearing before the judge is improper under the test first advanced by this Court in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). When the State takes an exception to a master's finding, it causes the normal process to be aborted prior to a final termination of the proceedings. The record illustrates that, but for the filing of the exception, the judge would have signed the master's recommendations.

IV. Even if the second hearing before the juvenile court judge is held on the record rather than *de novo*, it nevertheless violates the double jeopardy clause. The judge, who has only a tape recording or transcript before him, has different evidence to consider than did the master because he is not in the same position to evaluate the credibility of witnesses. However, even if the evidence before him is viewed as being identical to the evidence before the master, double jeopardy principles are offended because the

prosecutor is receiving another chance before a second fact-finder to obtain a guilty verdict after having failed to do so before the first.

V. The facts and circumstances of the instant case demonstrate that a child is placed in jeopardy for a second time if the State excepts to the master's finding and he is subjected to a hearing either *de novo* or on the record. The facts of this case, unlike the facts in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), present no countervailing interest which overcome the right of the child not to be placed twice in jeopardy for the same offense.

ARGUMENT

I. THE DOUBLE JEOPARDY PROTECTIONS EMBODIED IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAVE BEEN LIBERALLY APPLIED BY THIS COURT TO BOTH CRIMINAL AND JUVENILE DELINQUENCY PROCEEDINGS

Before analyzing whether double jeopardy protections should be applied to prohibit second hearings as authorized by the statute and rule in dispute, it is helpful to delineate the present reaches of the double jeopardy protection. It is apparent that, whatever its precise meaning at common law, the double jeopardy concept has been extended by this Court to cover a broad range of interests relating to the right of a criminal defendant to be free from multiple trials and punishments for the same offense. Likewise, the Court has already accepted the basic notion that persons should not be denied these benefits simply because they are children.

A. The Development of Double Jeopardy Rights for the Criminal Defendant

As this Court has frequently noted, the concept of double jeopardy is deeply rooted in our history and can be traced back at least as far as the Greek and Roman empires. *See Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting); *United States v. Wilson*, 420 U.S. 332, 339-42 (1975). *See also* J. SIGLER, DOUBLE JEOPARDY, 1-37 (1969). Since *Benton v. Maryland*, 395 U.S. 784 (1969), these protections apply with full force to the states.[96] In an often quoted statement in *Green v. United States*, 355 U.S. 184, 187-88 (1957), this Court articulated the central objective of the double jeopardy clause:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being

[96]At least with respect to the central purpose of a constitutional rule, this Court has in recent years consistently refused to apply to the states through the due process clause of the Fourteenth Amendment, "watered-down" versions of the Bill of Rights. *See Benton v. Maryland*, 395 U.S. at 794-95. The instant case does not involve some aspect of a constitutional protection which might be deemed incidental to the purpose of the constitutional rule and, hence, not applicable to the states. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970); *Apodaca v. Oregon*, 406 U.S. 404 (1972). Although there may be some aspects of double jeopardy law which might be carved out and designated as sufficiently tangential to the central purpose of the double jeopardy clause so as not to require application of the protection to the states, *see, e.g., Bretz v. Crist*, 546 F.2d 1336 (9th Cir. 1976), *juris. post. sub nom., Crist v. Cline*, No. 76-1200, 430 U.S. 982 (1977), the instant case plainly does not involve interests which can be so categorized. *See* discussion in Brief on Reargument for the United States as *Amicus Curiae, Crist v. Cline*, No. 76-1200, (Oct. Term, 1977) at 2-3.

> subjected to the hazards of trial and possible conviction more than once for an alleged offense.
>
> * * *
>
> This underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See also Benton v. Maryland, 395 U.S. at 795-96; *Serfass v. United States*, 420 U.S. 377, 387-88 (1975).

Although at common law the double jeopardy protection was designed to protect a defendant from a new prosecution after final acquittal or conviction,[97] the protection, as it has developed in this country, is much broader in scope than either its English roots or the current practice in England.[98] In *United States v. Jorn*, 400 U.S. 470 (1971) this Court noted:

> A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections

[97]A careful examination of the development of double jeopardy principles in English law and the transfer of those concepts into the federal and state constitutions of this country is set forth in the Brief on Reargument for the United States as *Amicus Curiae, Crist v. Cline*, No. 76-1200 (Oct. Term, 1977) at 9-19.

[98]*See* 11 Halsbury's Laws of England, §242 (4th ed. 1976).

> which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. 400 U.S. at 479 (plurality opinion).

In considering those circumstances in which the Government would be permitted to prosecute a second time for the same offense when the first trial ended before the verdict was reached, the Court gave recognition to "a defendant's valued right to have his trial completed by a particular tribunal. . . ." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). *See also Lee v. United States*, 432 U.S. 23, 34 (1977) (Brennan, J., concurring); *Arizona v. Washington*, - U.S. -, 46 U.S.L.W. 4127 (Feb. 21, 1978).

Obviously a person who has not yet been acquitted or convicted runs no risk of being acquitted or convicted a second time when he is tried again for the same offense. Nevertheless, the *risk* of conviction remains present at each prosecution, and it is that risk and all the detriments attendant to it, that this Court has insisted on minimizing in its evolving interpretation of the meaning of double jeopardy protections. This point was made in one of its most recent double jeopardy decisions:

> Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. *Abney v. United States*, 431 U.S. 651, 661 (1977).

See also Price v. Georgia, 398 U.S. 323, 331 (1970).[99] In *Abney*, this Court concluded that a pre-trial order denying a motion to dismiss an indictment on double jeopardy grounds fell within the "collateral order" exception to the final judgment rule set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In reaching this conclusion, the Court stressed that double jeopardy rights "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence," 431 U.S. at 660, since the double jeopardy clause is designed to protect against undergoing unnecessary trials as well as punishment.

In sum, the double jeopardy clause protects the accused's verdict of acquittal from subsequent attack. It guards against an accused being convicted or punished a second time for the same offense. Finally, it insures that, absent special circumstances, the defendant will not have to endure more than one trial with its embarrassment, expense, and other hardships.

So vigorously has this Court enforced double jeopardy protections against multiple trials that exceptions "have been only grudgingly allowed." *United States v. Wilson*,

---

[99]In *Price*, the State of Georgia contended, *inter alia*, that since Price suffered no greater punishment on a second conviction for the same offense than he did on the first, any second jeopardy was harmless error under *Chapman v. California*, 386 U.S. 18 (1967). Rejecting that contention, this Court stated:

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. 398 U.S. at 331 (footnote omitted).

420 U.S. at 343. Where the defendant himself appeals a conviction and is successful in having it reversed, it has been accepted since *United States v. Ball*, 163 U.S. 662 (1896) that he may be tried again without offending the double jeopardy clause.[100] The defendant may also be subjected to a second trial where the first one is ended prematurely if the reason for the aborted trial can be justified by "manifest necessity" and the failure to reprosecute would "defeat the ends of public justice. . . ." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).[101]

[100]This exception to the double jeopardy rule has normally been explained either on the theory that, by appealing his conviction, the defendant waived his plea of former jeopardy, or on the theory that the act of appeal simply continued the first jeopardy. *See Green v. United States*, 355 U.S. at 189; *Price v. Georgia*, 398 U.S. at 329. Both theories pose certain difficulties. "Continuing jeopardy" becomes confused with the very different and more expansive "continuing jeopardy" concept that was postulated by Mr. Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195 U.S. 100, 134 (1904) in an attempt to justify Government appeals from acquittals. The Holmes "continuing jeopardy" concept, however, has never been adopted by a majority of the Court. *See United States v. Jenkins*, 420 U.S. 358, 369 (1975); *Breed v. Jones*, 421 U.S. 519, 534 (1975). The waiver theory, likewise, becomes confused with the more traditional waiver notions set forth in *Johnson v. Zerbst*, 304 U.S. 458 (1938), although in this double jeopardy context "waiver" tends to have a somewhat different meaning. *See United States v. Jorn*, 400 U.S. at 484 n.11 (1971) (plurality opinion); *United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976). More recently, this Court eschewed both approaches, pointing out that an analysis of the competing interests of the defendant and society better explains the reason for the exception than do conceptual abstractions. *See United States v. Tateo*, 377 U.S. 463, 466 (1964); *Breed v. Jones*, 421 U.S. 519, 534 (1975).

[101]The "manifest necessity" exception has been the subject of much litigation since *Perez*, *See, e.g., Simmons v. United States*, 142 U.S. 148 (1891); *Logan v. United States*, 144 U.S. 263 (1892); *Wade v. Hunter*, 336 U.S. 684 (1949); *Downum v. United States*, 372 U.S. 734 (1963); *Gori v. United States*, 367 U.S. 364 (1961); *United States v. Jorn*, 400 U.S. 470 (1971); *Illinois v. Somerville*, 410 U.S. 458 (1973).

Likewise, the defendant may be tried again when he, himself, requests a mistrial, provided that the need for making such a request is neither prosecutorial nor judicial over-reaching.[102] As appellees will establish, *infra*, none of these three exceptions justifies their retrial for the same offense.[103]

B. The Development of Double Jeopardy Rights for the Juvenile

Since 1966, this Court, in a series of cases, has explored the extent to which juveniles charged with criminal acts in a juvenile court[104] may invoke provisions of the Bill of Rights in the same manner as if they had been prosecuted

[102]*See United States v. Dinitz*, 424 U.S. 600 (1976); *Lee v. United States*, 432 U.S. 23 (1977).

[103]Another exception to normal double jeopardy principles, the "dual sovereignty" doctrine, would allow a second trial under the theory that since a separate sovereignty is prosecuting the defendant, the "second trial is really a trial for a completely separate offense. *Bartkus v. Illinois*, 359 U.S. 121 (1959). *Bartkus* was rendered in an era when double jeopardy concepts had not yet been held to apply with full force to the states. Since *Waller v. Florida*, 397 U.S. 387 (1970), the doctrine has not been available to justify two prosecutions for the same act, if each stems from a different arm of government within the territory of a single state. Although much of *Bartkus'* force appears to have been dissipated by subsequent double jeopardy rulings of this Court, recent efforts to obtain reconsideration of the dual sovereignty issue have been unsuccessful. *See Turley v. Wyrick*, 554 F.2d 840 (8th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3453 (Jan. 16, 1978).

[104]Typically, as in Maryland, juvenile courts use words other than "crime" in describing the act that the child is charged with committing. Whatever the terminology, appellees direct themselves to those offenses which, if committed by an adult and prosecuted in criminal courts, would constitute violations of penal laws.

as adults in the criminal courts. *See Kent v. United States*, 383 U.S. 541 (1966);[105] *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Without canvassing these cases in detail,[106] it is sufficient to note that they represent a major shift from the *parens patriae* philosphy that fostered the juvenile court system and an effort to bring realism into thinking about the juvenile justice system. While the Court has been unwilling to declare the juvenile court experiment a total failure, *see McKeiver v. Pennsylvania*, 403 U.S. at 551 (plurality opinion),[107] it has also been unwilling to invoke "the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings" as a means of avoiding a realistic assessment of the effect that a juvenile delinquency proceeding has on the children involved. *In re Gault*, 387 U.S. at 50.

Three terms ago, this Court made its most recent pronouncement concerning application of constitutional rights to juveniles charged with crime. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court ruled that it was "simply too late in the day to conclude . . . that a juvenile is not put in jeopardy" when he is tried in a juvenile court for committing an act that violates a criminal law. 421 U.S. at

[105]Although *Kent* involved a construction of the District of Columbia's juvenile code, its constitutional underpinnings have been firmly established since the Court decided *In re Gault*, 387 U.S. 1, 12-13 (1967).

[106]The particular significance to this case of *In re Winship* is discussed *infra*, at 86.

[107]The emergence of the juvenile court system in this country is traced in Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). *See also In re Gault*, 387 U.S. at 14-19.

529. In concluding that juveniles enjoy the double jeopardy protections of the Fifth Amendment, this Court explicitly emphasized the admonishment in *Gault* that the juvenile delinquency process be recognized for what it really is—not what label is put on it. 421 U.S. at 529. Although the holding of *Breed* is concerned with only one of a number of possible situations in which a juvenile may be subjected to a second jeopardy,[108] it is clear that the thrust of *Breed* is to extend the full protections of the double jeopardy clause to persons who are forced to appear before two fact-finders for the same criminal offense, whatever the combinations may be in terms of adult or juvenile court appearances.[109] Indeed, appellees will demonstrate that the narrow holding of *Breed* completely disposes of appellants' central

[108]In *Breed*, the first jeopardy attached to the prosecution in the juvenile court and the second to the prosecution in the adult criminal court. Another obvious double jeopardy violation would arise with successive prosecutions within the juvenile court for the same offense. *See, e.g., M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971). Although unlikely, it would be possible theoretically for jeopardy to attach first when the juvenile is prosecuted in criminal court and then subsequently attach in a juvenile court proceeding commenced as a result of a "reverse" waiver of jurisdiction. *See, e.g.*, Ann. Code Md., Art. 27, §594A (1976 and 1977 Cum. Supp.). Within these basic combinations are numerous permutations involving such questions as what was the precise nature of the hearing at which it is claimed that jeopardy attached, *see, e.g., In re Hurlic*, 20 Cal. 3d 317, 572 P.2d 57, 142 Cal. Rptr. 443 (1977), or what was the authority or power of the judicial officer who presided at the hearing where it is alleged that jeopardy attached. *See, e.g.*, the instant case.

[109]Appellees, of course, recognize that the traditional exceptions to the double jeopardy protection discussed *supra*, at 37-39, continue unabated after *Breed*. None of them, however, has any application to the instant case. See *infra*, at 80-86.

argument.[110] While appellants' alternative argument[111] may perhaps survive *Breed's* narrow holding, it surely does not survive the thrust of its reasoning.

II. INITIAL JEOPARDY ATTACHES WHEN THE JUVENILE COURT MASTER BEGINS TO TAKE EVIDENCE AT AN ADJUDICATORY HEARING

It is axiomatic that a person must be placed in jeopardy once before he can be placed in jeopardy a second time in violation of constitutional double jeopardy protections. *Serfass v. United States*, 420 U.S. 377, 392 (1975). Appellants' central contention is that jeopardy never attaches at a hearing before a master, but instead attaches for the first time only when, at the request of the child or the state, the juvenile court judge commences to hear evidence at a *de novo* or an on the record hearing.[112] An examination of the law relating to the type of proceeding at which jeopardy attaches and the point in that proceeding at which it attaches reveals that appellants' position is unsupported by the cases that deal generally with double jeopardy and is at total odds with this Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975).

[110]See Brief of Appellants at 13-23.

[111]See Brief of Appellants at 23-30.

[112]See Brief of Appellants at 13-23. Appellees discuss *infra*, at 86-92 whether it is constitutionally significant if the second hearing before the judge is *de novo* instead of on the record.

A. The Adjudicatory Hearing Before the Master Is the Type of Proceeding to Which Jeopardy Attaches

The threshold question is whether the adjudicatory hearing before the master is the type of proceeding to which jeopardy attaches. Pointing out that jeopardy "denotes risk", the Court in *Breed v. Jones* analyzed "an aspect of the juvenile court system in terms of the kind of risk to which jeopardy refers." 421 U.S. at 528, 531. Using this analysis, the Court concluded that, for purposes of the attachment of jeopardy, "there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution." 421 U.S. at 530. The *Breed* Court recognized that in juvenile delinquency proceedings it is the adjudicatory hearing when the respondent is "put to trial before the trier of the facts, ..." 421 U.S. at 531. *See also United States v. Jorn*, 400 U.S. 470, 479 (1971); *Serfass v. United States*, 420 U.S. 377, 389 (1975). The adjudicatory hearing in the Baltimore City juvenile court, like the one in *Breed*, is the stage at which the trier of facts hears evidence on the issue of innocence or guilt. *Matter of Brown*, 13 Md. App. 625, 632, 284 A.2d 441, 444-45 (1971). See also A. 11-14, 52.

That the fact-finders at appellees' trials were masters rather than judges[113] does not change the fact that jeopardy initially attaches at the adjudicatory hearing. Indeed, *Breed* settles this issue since the presiding officer at the juvenile

[113]Naturally, the judge, himself, is a fact-finder in those cases which are set before him either initially or by way of exception (T.I. 87, 101-03).

court adjudicatory hearing in that case—at which jeopardy was held to attach—was a *master*,[114] not a judge. *See* Appendix, *Breed v. Jones*, at 8-9, 17-19. Wholly aside from *Breed*, one must be blind to reality not to recognize that the judicial officer presiding at the adjudicatory hearing is serving as the fact-finder on the issue of innocence or guilt. As the California Court of Appeal recently noted in upholding the right of a juvenile court master to be a fact-finder: "The human being and not the title finds the facts." *In re Jay J.*, 66 Cal. App. 3d 631, 634, 136 Cal. Rptr. 125, 127 (1977). *See also Holiday v. Johnston*, 313 U.S. 342, 352-54 (1941); *Wingo v. Wedding*, 418 U.S. 461, 474 (1974).

B. Initial Jeopardy Attaches at That Point in the Adjudicatory Hearing When the Master, Sitting as Fact-Finder, Begins to Receive Evidence

Once it is established that a master's adjudicatory hearing is that type of proceeding at which constitutional jeopardy concepts become implicated, all that remains to be decided is the point in the hearing at which initial jeopardy

[114]In California, the term "referee" is used to designate the subordinate judicial officer who, in Maryland, is known as a master. *See* Cal. Welf. & Inst. Code, §247 (West 1977 Supp.). To avoid unnecessary confusion in terms, the term "master" will be used when referring to the juvenile court referee in California. As explained *infra*, at fn.129, the role of the referee in the California juvenile court and the role of the master in the Maryland juvenile court are strikingly similar; those differences that do exist do not bear on the legal issues presented in the instant case. *See* Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3 (1967).

first attaches. Upon that decision hinges the answer to the ultimate question—whether a violation of double jeopardy principles occurred in the circumstances of a particular case. *See Serfass v. United States*, 420 U.S. 377, 388 (1975).

Although the common law rule was more restrictive,[115] this Court has, over the years, pushed back in time the point at which jeopardy attaches.[116] Presently a defendant is placed in jeopardy when he is put to trial before the trier of facts. *United States v. Jorn*, 400 U.S. 470, 479 (1971). When the fact-finder is a jury, the point at which the defendant is put to trial has been assumed to be the point at which the jury is sworn. *Downum v. United States*, 372 U.S. 734 (1963); *Illinois v. Somerville*, 410 U.S. 458, 467 (1973); *Serfass v. United States*, 420 U.S. at 388; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). In *Serfass* and *Martin Linen Supply*, this Court established that, at a bench trial, jeopardy attaches when a judge begins to receive evidence. *Accord*, *Lee v. United States*, 432 U.S. 23, 27 n.3 (1977). Although the point of attachment for jury trials is presently under review in *Crist*

[115]See the discussion *supra*, at 35.

[116]The present standard evolved in a series of cases. *See, e.g., Kepner v. United States*, 195 U.S. 100, 128 (1904); *Bassing v. Cady*, 208 U.S. 386, 391-92 (1908); *Collins v. Loisel*, 262 U.S. 426, 429 (1923); *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *Green v. United States*, 355 U.S. 184, 188 (1957).

v. Cline, No. 76-1200, *juris. post.*, 430 U.S. 982 (1977),[117] this Court has given no indication that the attachment of jeopardy should be any later than the point at which the fact-finder begins to hear evidence.[118]

In *Breed*, this Court without hesitation ruled that jeopardy attached "when the Juvenile Court, as the trier of the facts, began to hear evidence." 421 U.S. 519, 531 (1975). Indeed, the California appellate court in *Breed* had earlier reached the same conclusion. *See In re J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 189 (1971). *Accord*, *In re S.*, 10 Cal. App. 3d 952, 956, 89 Cal. Rptr. 499, 501-02 (1970); *In re Hurlic*, 20 Cal. 3d 317, 325 n.8, 572 P.2d 57, 61-62 n.8, 142 Cal. Rptr. 443, 447-48 n.8 (1977).

---

[117]On December 5, 1977, the Court ordered reargument in *Crist v. Cline*, requesting the parties and the United States to address the following questions:

> 1. Is the rule heretofore applied in the federal courts—that jeopardy attaches in jury trials when the jury is sworn—constitutionally mandated?
>
> 2. Should this Court hold that the Constitution does not require jeopardy to attach in any trial—state or federal, jury or non-jury—until the first witness is sworn? 98 S. Ct. 603, 604.

[118]In their Brief on Re-argument in *Crist v. Cline*, at 19, appellants contend that jeopardy should not attach until the prosecutor has produced evidence adequate to make out a *prima facie* case of guilt. Even though that standard would be of no help to the appellants in the instant case, appellees share the view expressed in the Brief on Reargument for the United States as *Amicus Curiae*:

> The rule in bench trials is that jeopardy attaches when evidence is introduced, and we believe it is untenable today, in light of the history set forth above, to suggest that any later point would be permissible. *Id.* at 19 (footnote omitted).

C. Appellants' Principal Argument—That Appellees' Double Jeopardy Rights Were Not Violated Since They Were Never Placed in Initial Jeopardy Before a Master—Does Not Square with Either Breed v. Jones or the Earlier Double Jeopardy Rulings of This Court

Appellants' principal argument—that jeopardy does not attach at the master's adjudicatory hearing—rests on essentially three contentions. First, they argue that *Breed v. Jones*, 421 U.S. 519 (1975) supports their position. Second, they invoke the constitutional and decisional law of Maryland to demonstrate that a juvenile court master plays such a limited role that a hearing he conducts could not be one at which jeopardy attaches. Finally, they contend that jeopardy cannot attach to a master's hearing because the master lacks jurisdiction to try or adjudicate the issue of innocence or guilt.[119]

1. The Relevance of Breed v. Jones

In their Brief at 14, 21, appellants quote from portions of the *Breed* opinion, in each case italicizing written phrases for emphasis. On page 14, the phrase italicized is: *"when the juvenile court, as the trier of facts, began to hear evidence."* On page 21, the italicized words which

---

[119]These three points, which will serve as the focus for an analysis of appellants' position, are not set out specifically in separate subsections of their Brief. However, appellees have organized appellants' discussion that appears at 13-23 of their Brief into these three arguments in order to facilitate a reasoned analysis of the appellants' position.

immediately follow the phrase "an adjudicatory hearing" are: *"such as was held in this case"*. When combined with a further quotation from *United States v. Jenkins*, 420 U.S. 358 (1975), where the word *"judge"* is italicized, Brief of Appellants' at 15, it is clear that appellants view *Breed* as establishing an attachment of jeopardy rule that applies only when the adjudicatory hearing is presided at by a judge. As noted earlier,[120] the very holding in *Breed* necessarily encompasses the adjudicatory hearing presided at by a master since such was the case in *Breed* itself.

Appellants further contend that the use of the phrase "an adjudicatory hearing such as was held in this case" indicates an express intent by this Court to limit the application of double jeopardy principles to the very facts of *Breed*. Brief of Appellants at 21. It is not clear whether appellants' allusion to "the specific facts" refers to the type of judicial officer who presided at the adjudicatory hearing[121] or to the fact that *Breed* involved one hearing in the juvenile court and another hearing in a criminal court.[122] If the latter is the case, the instant case does differ from *Breed* merely because each hearing in which appellees claim that jeopardy attaches takes place within the juvenile court.

Putting to one side the question of whether a proceeding before a juvenile court master, followed by another before a juvenile court judge, is properly viewed as

[120]See discussion *supra*, at 43-44.

[121]If this is appellants' contention, appellants will not prevail on this point even if this Court does limit the application of *Breed* to its facts.

[122]The language in the last two sentences of appellants' Brief at 21 suggests the latter, but their use of the sentence from *Breed*, which they quote in the middle of their Brief at 21, suggests the former.

involving only one jeopardy,[123] there is nothing in *Breed* which suggests that successive prosecutions within a juvenile court system would be governed by a rule different from the one that prohibits successive prosecutions in separate court systems. Under appellants' reading of *Breed*, that case would theoretically approve the prosecution of a child by a juvenile court judge on a charge for which he had already been acquitted by another juvenile court judge at an earlier time. This very result was rejected by the California Supreme Court in *M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971).[124] The thrust of *Breed* is that it was no longer tenable to conclude that jeopardy could not attach at a trial simply because it took place in the juvenile court. 421 U.S. at 529. It is wholly illogical to assume that this Court meant to state that it was "too late in the day" to conclude that a first jeopardy could not attach in juvenile court, but too early in the day for a second to attach in that court.

Finally, appellants seek to distinguish *Breed* on the ground that the master in the instant case makes no adjudication, but instead merely submits proposed findings to the juvenile court judge. Brief of Appellants at 22.[125] It is not clear precisely what appellants mean by the use of the word "adjudication," and the question is hardly clear under

[123]See the discussion *infra*, at 63-86.

[124]A year later, in *Bryan v. Superior Court of Los Angeles County*, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972), the California Supreme Court took the opposite position in a case involving the identical question which this Court resolved in *Breed*.

[125]Whether the master submits "findings" to the judge, or merely "proposed findings", and the significance of this difference in terminology, is discussed *infra*, at 56-57.

Maryland law.[126] To the extent that appellants use that word to mean that the master has no power to enter a final order,[127] *Breed* is not inapposite.[128] In California the master is regarded as a subordinate judicial officer whose power to enter final orders is severely circumscribed.[129] Indeed,

[126]*See Matter of Brown*, 13 Md. App. 625, 630-31, 284 A.2d 441, 444 (1971). *See also* §3-819(b); Rule 914.f.

[127]Appellees discuss *infra*, at 78-80, the significance for double jeopardy purposes of the fact that a master's power to enter orders is limited.

[128]Indeed, *Breed* illustrates how similar the powers of the master in Maryland and California are respecting the entry of final orders. It is clear from an examination of the record in *Breed* that, had the decision not been made to transfer Jones to the criminal court, the disposition in the juvenile court would have been commitment to an institution. *See* Appendix, *Breed v. Jones*, at 21-22. Under California statute, the judge must expressly approve the decision of a master to remove a child from his home. Cal. Welf. & Inst. Code, §249 (West 1977 Supp.). Thus an "order" by the master in *Breed* to commit Jones to an institution would have precisely the same effect as the "finding" of the master in Maryland to commit a child to an institution. See *infra*, at fn.129.

[129]A comparison of the statutory provisions and court interpretations of Maryland and California juvenile law shows that the role and power of the master in California and the master in Maryland are nearly identical. Similar constitutional and statutory provisions authorize their appointment. Constitution of Maryland, Art. IV, §9; Constitution of California, Art. VI, §22; Ann. Code Md., Cts. & Jud. Proc. Art. (1974 and 1977 Cum. Supp.) (cited in this footnote as "Md.") §§2-102, 2-501, 3-813; Cal. Welf. & Inst. Code (West 1977 Supp.) (cited in this footnote as "Cal.") §247. Both have similar powers to conduct hearings. Md. §3-813; Md. Rule 911.a.2; Cal. §248. Both have a duty to make findings and conclusions and to issue orders or proposed orders which are to be transmitted to the parties and to the judge. Md. §3-813(b); Md. Rule 911.b; Cal. §248. In both states review by the judge of the master's findings may be sought. Md. §3-813(c); Md. Rule 911.c; Cal. §252. In Maryland the juvenile always has the right to a rehearing which may be on the record or *de novo* as he chooses. Md. §3-813; Md. Rule 911.c. In California the juvenile may be denied a

(continued)

appellants have referred to several California decisions as having "sanctioned the use of juvenile referees in much the

(footnote continued from preceding page)

hearing *de novo* but the judge must consider the record. Cal. §§252, 254; *In re Damon C.*, 16 Cal.3d 493, 546 P.2d 676, 128 Cal. Rptr. 172 (1976); *In re Edgar M.*, 14 Cal.3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975). In Maryland the State may be granted a rehearing on the record. Md. Rule 911.c. In California the State has no statutory right to request a rehearing, but in practice the judge will review the record if requested by the prosecutor and will grant a hearing *de novo* on his own motion. *Leach v. Superior Court for County of Los Angeles*, 98 Cal. Rptr. 687, 691-92 (Cal. Ct. App. 1971). In both states the judge may set aside the findings or order of the master and hold a hearing *de novo*. Md. §3-813(e); Md. Rule 911.d; Cal. §§253, 254. In Maryland the master has the power to issue an order for detention or shelter care prior to the adjudicatory hearing, Md. Rule 911.a.1, and between disposition and final review by the judge. Md. §3-813(d); the California master has similar power to issue temporary detention. *In re Edgar M.*, 14 Cal.3d 727, 738 n.8, 537 P.2d 406, 414, n.8, 122 Cal. Rptr. 574, 582 n.8 (1975). In cases where the California master is issuing an order removing a minor from his home (Cal. §249) or in California jurisdictions where the judge exercises his option to require all orders of masters to be expressly approved (Cal. §251), the master is on exactly the same footing as the master in Maryland. In other cases (Cal. §250), where the master has found the juvenile not guilty or is recommending probation, the California master appears to have greater power to issue a final order since he does, in fact, sign and issue the "order" while the Maryland master, in matters not involving detention, can issue only "proposed orders". In both states, however, the master's actions do not become final until the judge takes some steps, either by deciding not to disturb them or by setting them aside. In Maryland the judge must expressly adopt the master's findings (Md. §3-813(d)); in California approval of the master's orders by the judge need not be express if the orders do not remove a minor from his home (Cal. §249). The California Supreme Court has said, however, that where the juvenile has applied for a rehearing, giving effect to the master's orders by operation of law rather than by affirmative judicial act would violate the state Constitution since "[a] referee is constitutionally limited to the performance of 'subordinate judicial

(continued)

same way as the master functions in Maryland." Brief of Appellants at 22.[130]

(footnote continued from preceding page)
duties.' " *In re Edgar M.*, 14 Cal.3d at 732, 537 P.2d at 410, 122 Cal. Rptr. at 578. The master's "orders" are only conditional and "in effect . . . subject to review and approval by such judge." *Bradley v. People*, 258 Cal. App.2d 253, 260-61, 65 Cal. Rptr. 570, 575 (1968); *see also In re Henley*, 9 Cal. App.3d 924, 930, 88 Cal. Rptr. 458, 461 (1970).

[130]The three California cases which appellants cite, *Bradley v. People*, 258 Cal. App. 2d 253, 65 Cal. Rptr. 570 (1968), *In re Henley*, 9 Cal. App. 3d 924, 88 Cal. Rptr. 458 (1970), and *Jesse W. v. Super. Ct. of San Mateo Cty.*, 133 Cal. Rptr. 870 (Cal. Ct. App. 1976), *hearing granted*, No. SF23580 (Dec. 29, 1976), are all premised on the notion that there is one continuing jeopardy as the case proceeds from referee to judge. *Bradley* and *Henley* were rendered prior to this Court's decision in *Breed*. *Jesse W.* was decided after *Breed*, but the California Supreme Court granted review (No. SF23580 (Dec. 29, 1976)) and the case has been argued. Under Rule 976(d) and 977, Cal.R.Ct., a decision by the California Supreme Court to review a lower court opinion supersedes that opinion and it may not be published in the official reporter or cited by a court or party, except for purposes of law of the case doctrine. Thus *Jesse W.* has no precedential worth in California. Moreover, *Jesse W.* incorrectly distinguishes *Breed* on the theory that a juvenile court judge presided at the adjudicatory hearing and either subsequently made the adjudication or, in any event, remanded the juvenile to the criminal court for a second trial following the adjudicatory hearing before a master. 133 Cal. Rptr. at 873. The record in *Breed*, however, reveals that a master—not a judge—handled both of these functions. *See* Appendix, *Breed v. Jones*, 421 U.S. 519 (1975) at 17-19, 20-23. The only role ever played by a juvenile court judge in *Breed* was to preside at a collateral proceeding held to consider the petition for writ of habeas corpus that Jones filed. *Id.* at 36-45.

Appellants cite two other cases as further support for their position. The first, *People v. J.A.M.*, 174 Colo. 245, 483 P.2d 362 (1971), while suffering from the same infirmities as *Bradley*, is distinguishable since the parties there had an opportunity, pursuant to statute, to agree initially to have the hearing before a master instead of the judge. The *J.A.M.* court noted that by choosing to appear before the referee, the parties impliedly agreed to the procedure for a second hearing before

(continued)

2. The Requirements of the Maryland Constitution and Decisional Law

Quoting from the Maryland Constitution and citing *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974),[131] appellants conclude that a master is entrusted with no part of the state's judicial power, that he is merely a ministerial officer and advisor to the court, that he may submit only proposed findings of fact and conclusions of law, and that he may be likened to the traditional master in chancery. Brief of Appellants at 15-17, 19, 22. Through these characterizations of the master and his role, appellants seek to further their position that the double jeopardy clause does not apply to the master's hearing. Such descriptions, however, are inaccurate and irrelevant.

The Maryland constitutional provision which appellants quote, Art. IV, §1, simply provides that the state's judicial power shall be vested in a series of courts which that constitutional provision enumerates. While the section does not list masters in describing how the judicial power is distributed,[132] neither does it mention judges.[133] Thus, to

(footnote continued from preceding page)
the judge. 174 Colo. at 248-49, 483 P.2d at 364. See also the discussion in the Amicus Curiae Brief filed by the National Juvenile Law Center, at 7-11, 20. As noted earlier, see *supra*, at 24, the juvenile has no such choice in Maryland. The final case appellants cite, *Matter of Maricopa County, Juvenile Act. No. J-75658-S*, 26 Ariz. App. 519, 549 P.2d 614 (1976), relies, with very little analysis, on the *Bradley* opinion and never even cites this Court's opinion in *Breed*.

[131]See the discussion of *Matter of Anderson supra*, at 10-11.

[132]The power of Maryland courts to employ masters, to the extent that power is not inherent, stems from the Constitution of Maryland, Art. IV, §9. *See* E. MILLER, EQUITY PROCEDURE (1897) at §555.

[133]Appellants cite *Hagerstown v. Dechert*, 32 Md. 369 (1870) as holding that "the General Assembly could not vest judicial power in

(continued)

contend that a master in Maryland is not entrusted with the state's judicial power is somewhat misleading since that power is vested in institutions called "courts"[134] which are made up of numerous persons who are given a whole range of functions in connection with the exercise of judicial power. By making it seem as if the Maryland Constitution lists a series of persons who may exercise judicial power and a series of persons who may not, appellants push themselves into the use of phrases which seek to characterize the master as an incidental figure located somewhere in the murky depths of the judicial system.[135]

(footnote continued from preceding page)
any other *officer* except those enumerated in the first section of the Fourth Article of the Constitution of Maryland". Brief of Appellants at 15 (emphasis added). At the time *Dechert* was rendered, Art. IV, §1 vested judicial power in a series of courts and in justices of the peace. That provision was subsequently amended to delete justices of the peace. *See* 1969 Md. Laws, Ch. 789 (ratified Nov. 3, 1970). The use of the word "officer" in *Dechert* stems perhaps from the existence at that time of the provision relating to justices of the peace.

[134]Blackstone defined a "court" as being "a place where justice is judicially administered." 3 W. BLACKSTONE, COMMENTARIES *23.

[135]Appellees acknowledge that, as the final arbiters of state law, state courts may create state law definitions which federal courts are bound to accept. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Brown v. Ohio*, 432 U.S. 161 (1977). It is equally well settled, however, that this Court, in exercising its constitutional authority under the supremacy clause, is the final interpreter of the United States Constitution. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Thus, a state court decision can not preclude this Court from considering whether an individual's constitutional rights have been infringed by "putting forward non-Federal grounds of decision that [are] without any fair or substantial support." *Ward v. Love County*, 253 U.S. 17, 22 (1920). *See also Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Whatever questions involving purely state law matters there may be in the instant case, it is clear that the basic question presented by appellees involves the application of federal constitutional
(continued)

To minimize the master's role, appellants describe him as a mere "ministerial officer and advisor to the court." Brief of Appellants at 16. Whatever "form of words" might be used in describing the master's title, *see United States v. Hark*, 320 U.S. 531, 534 (1944),[136] the overwhelming

(footnote continued from preceding page)
principles. Hence, this Court should determine appellees' Fifth Amendment claim regardless of the resolution of the same claim by the Court of Appeals of Maryland in *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974). *See Aldridge v. Dean*, 395 F. Supp. 1161, 1169 (D.Md. 1975).

It is not entirely clear whether the court in *Anderson* based its decision on: 1) the legal conclusion that, under Maryland law, a master is not empowered to conduct a trial to which jeopardy can attach, or 2) the factual determination that an adjudicatory hearing before the master is so unlike a trial conducted by a judge that the implication of double jeopardy principles is precluded. To the extent that *Anderson* turned on the legal conclusion that the role of the master is "only *advisory*" (emphasis in original), 272 Md. at 102, 321 A.2d at 525, it is clear that the court "disregard[ed] substance because of the feeble enticement of . . . [a] label-of-convenience which has been attached to juvenile proceedings." *In re Gault*, 387 U.S. 1, 50 (1967). Adherence to constitutional requirements is "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). If, on the other hand, the court's opinion purported to describe what occurs as a factual matter at a master's hearing, and, on that basis, concluded that double jeopardy principles were not implicated, the evidence in the record in the instant case amply demonstrates the fallacies of such descriptions and conclusions.

[136]In *Matter of Anderson*, the Maryland Court of Appeals noted, in summary, that it had cited cases "to the effect that a master is a ministerial officer, and not a judicial officer." 272 Md. at 106, 321 A.2d at 527. Yet one of its own decisions that it quotes from, *Bris Realty v. Phoenix*, 238 Md. 84, 208 A.2d 68 (1965), explicitly rejects an argument that a master is not a judicial officer. 238 Md. at 89, 208 A.2d at 69. The fact that various descriptive terms can be applied and withdrawn with such rapidity emphasizes the importance of concentrating on substance rather than form.

evidence demonstrates that the master presides over full trials and, for all intents and purposes, decides whether a child is innocent or guilty.[137]

The emphasis on form reaches its pinnacle when appellants point out that the master may submit only "proposed" findings of fact, conclusions of law and recommendations to the judge. Brief of Appellants at 19, 22. The insubstantiality of this argument is perhaps best revealed by the fact that appellants in their own Brief unconsciously omit the word "proposed" in referring to "findings of fact and conclusions of law," even while trying to build up the significance of that word.[138] As noted earlier,[139] the word "proposed" was inserted in several places in the section of the juvenile court rules describing masters when the rules were revised in June, 1975, in an effort to comply with the decision of the court below in *Aldridge v. Dean*, 395 F. Supp. 1161 (D. Md. 1975).

It is difficult to think of a case in which form would be more exalted over substance than one in which a court would attach significance, for purposes of construing the double jeopardy protections of the Constitution, to the fact that the word "proposed" was inserted in the juvenile court rule. Indeed, the manner in which it was inserted emphasizes the lack of importance that should be attached to this draftsman's game. When the changes were made in June, 1975, the word "proposed" was inserted in four different places in the text of the revised master rule—

[137]See *supra*, at 25-27, and *infra*, at 68-78.

[138]See Brief of Appellants at 18, 22, where, on the latter page, appellants speak of "proposed findings" in one sentence, and "findings" in the very next sentence.

[139]See *supra*, at 14-15.

immediately preceding each use of the phrase "findings of fact, conclusions of law". When the juvenile court rules were next revised two years later,[140] the master rule was amended to make both substantive and drafting changes. In making those changes, the drafters transferred a sentence in subsection c of the 1975 version to subsection a.2 of the current version. In addition, the text of that sentence was amended to delete the words "proposals and recommendations" and substitute the words "findings, conclusions and recommendations." Thus, with the federal district court's decision in *Aldridge v. Dean* now only a memory from an earlier year, the drafters of the revision neglected to insert the word "proposed" before the words "findings, conclusions and recommendations,"[141] illustrating how attentive they were to the subtleties of the decision.

Having described the juvenile court master as a ministerial officer who may make only proposed findings and conclusions, appellants then likened him to the traditional master in chancery. Brief of Appellants at 16. This comparison is odd in that according to the settled law of Maryland, a master, unlike an examiner, is empowered to make findings. *Bris Realty v. Phoenix*, 238 Md. at 89, 208

[140]See *supra*, at fn.8.

[141]While the drafters of the rule were tinkering with its language, deciding whether to insert or not insert "proposed", the Maryland General Assembly enacted a juvenile causes statute which contained a provision, §3-813, outlining the duties of masters. See *supra*, at 13. That section refers to the master's findings of fact and conclusions of law in three different places, never once using the word "proposed." Moreover, the legislature amended §3-813(d) in 1977, to add a sentence containing the words "findings, conclusions and recommendations," but again did not include the word "proposed". *See* 1977 Md. Laws, Ch. 259.

A.2d at 69. Moreover, the findings of a master in chancery are *prima facie* correct and may not be overturned unless clearly erroneous. *Id. See also Bar Ass'n. v. Marshall*, 269 Md. 510, 516, 307 A.2d 677, 680 (1973).[142] Since appellants' previous position in the instant case has been that review of the juvenile court master's findings and conclusions should not be restricted by substantial evidence or clearly erroneous standards,[143] it is not apparent why they now seek to compare the juvenile court master with the master in chancery.[144]

3. Jurisdiction of the Master to Adjudicate

Having characterized the master as a minor functionary, appellants contend that jeopardy cannot attach at a master's hearing since he has no power to decide innocence or guilt, and hence no jurisdiction to adjudicate. Brief of

[142]In a recent case, the Court of Special Appeals of Maryland upheld a local court rule which permits a judge to act on a party's exceptions to the findings of a master in chancery without granting the party the right to a hearing before the judge on the exceptions. *Rand v. Rand*, 33 Md. App. 527, 365 A.2d 586 (1976), *vacated on other grounds*, 280 Md. 508, 374 A.2d 900 (1977).

[143]See Reply Memorandum of Defendants, Respondents in *Brady v. Swisher*, Civil No. 74-1291 and *Aldridge v. Dean*, Civ. Nos. 74-1300—1308, filed on May 22, 1975, at 1-2. The memorandum is included in Vol. I of the original record in this Court as pleading no. 22.

[144]When describing the role of the traditional master in chancery, appellants state that it is not "proper for the court to refer the entire decision of a case to [the master] without the consent of the parties." Brief of Appellants at 16. So that this statement creates no confusion, it should be emphasized that in the juvenile court, cases are placed before masters for trial without the consent of the parties (T.I. 87; T.II. 13).

Appellants at 19-20. Absent the risk of guilt determination, appellants argue, jeopardy does not attach. *Id.* at 18.

As one distinguished judge has said, "the legal lexicon knows no word more chameleon-like than 'jurisdiction'." *United States v. Sabella*, 272 F.2d 206, 209 (2d Cir. 1959). Appellants' jurisdictional argument is a good example. To the extent that the appellants use "jurisdiction" in the basic sense of subject matter jurisdiction, *see Montana - Dakota Util. Co. v. Northwestern P.S.C.*, 341 U.S. 246, 249 (1951), they can scarcely argue that there is an absence of subject matter jurisdiction when the juvenile court master conducts the adjudicatory hearing. If that were the case, most of the trials in the juvenile court each year would be void proceedings.

The juvenile causes statute specifies those classes of cases in which the juvenile court does or does not have subject matter jurisdiction. §3-804. That section defines the jurisdiction[145] of a "court", not a judge or master. Since a master specifically is authorized to preside at adjudicatory hearings, *see* Rule 911.a.2, he is the representative of the court and, therefore, subject matter jurisdiction does not disappear when he sits behind the bench.

If appellants use the phrase "jurisdiction to adjudicate" to mean that the master may not enter a final order, they correctly state the facts but then reach the wrong conclusion—that jeopardy does not attach at the master's adjudicatory hearing. Appellants correctly stress that there must be risk of guilt for jeopardy to attach. However, the

[145]As is frequently the case, the jurisdictional section speaks in terms of "jurisdiction," not "subject matter jurisdiction." There can be no doubt, however, that the words "subject matter" are implied.

implication that there is no risk of guilt determination when the child is tried before the master, and hence, jeopardy cannot attach, is erroneous. Whether or not the master, himself, has the power to enter a final order adjudicating the child delinquent, surely there is no question that the juvenile undergoes "risk of a determination of guilt" when that hearing commences. *Serfass v. United States*, 420 U.S. 377, 391 (1975). Since the juvenile court judge signs the master's recommendation of delinquency in virtually 100 per cent of the cases (A.10-11), it is turning the world upside down to say that the child runs no risk of a determination of guilt when his hearing before the master commences.

Under the decisions of this Court, jeopardy attaches at a trial "if the court had jurisdiction of the cause and of the party. . . ."[146] *United States v. Ball*, 163 U.S. 662, 669-70 (1896). *See also Kepner v. United States*, 195 U.S. 100, 133 (1904); *Serfass v. United States*, 420 U.S. at 391. Whatever other defects may exist respecting the ability of the court to proceed to final judgment and sentencing,[147] and whatever language is used to describe the defect,[148]

[146]Appellants have never suggested that trial before the master results in defects in jurisdiction over the parties.

[147]*See, e.g., United States v. Ball*, 163 U.S. 662 (1896) (defective indictment); *Benton v. Maryland*, 395 U.S. 784 (1969) (defective indictment); *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959) (absence of statutory authority to impose sentence).

[148]In *Illinois v. Somerville*, 410 U.S. 458 (1973), an indictment which was defective under Illinois law led to the declaration of a mistrial after jeopardy had attached; subsequently, the accused was convicted under a new and valid indictment. This Court described the defect which caused the mistrial as "jurisdictional," 410 U.S. at 460, but nevertheless analyzed the case under the manifest necessity doctrine of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). As

(continued)

jeopardy nevertheless attaches at the beginning of the trial[149] unless the defect goes to subject matter jurisdiction itself.[150]

(footnote continued from preceding page)

this Court recognized, the *Perez* doctrine does not become applicable unless jeopardy has initially attached. 410 U.S. at 467-68. Obviously the Court was using the word "jurisdictional" to refer to the kind of defect which existed in cases such as *United States v. Ball* and *Benton v. Maryland*, 395 U.S. 784 (1969), not to the absence of subject matter jurisdiction.

[149]See *supra*, at 44-46.

[150]Although the doctrine that jeopardy cannot attach in the absence of subject matter jurisdiction has deep roots which need not be cut away in the instant case, *see United States v. Ball*, 163 U.S. at 669 and authorities cited therein, the logic of the doctrine is certainly questionable. In *Benton v. Maryland*, 395 U.S. 784, 796 (1969) this Court stated, in response to the State of Maryland's argument that one cannot be placed in jeopardy by a void indictment:

> This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this "void" indictment had he not appealed his burglary conviction.

See also United States v. Sabella, 272 F.2d at 208-09. Since *Benton* concluded that, at worst, the indictment was only "voidable," 395 U.S. at 797, it was unnecessary to face directly the question of whether one may be put in jeopardy by a proceeding which is totally void, as is the case when subject matter jurisdiction does not exist. However, the logic of the statement quoted from *Benton* applies equally to a totally void proceeding.

Rules respecting the attachment of jeopardy developed at a time when, at a first trial, defects less basic than absence of subject matter jurisdiction were held to have prevented an attachment of initial jeopardy. *See Vaux's Case*, 4 Coke 44, 76 Eng. Rep. 992 (K.B. 1590); 2 H. HAWKINS, PLEAS OF THE CROWN, 528 (1788); 4 W. BLACKSTONE, COMMENTARIES *335. At least since *United States v. Ball*, this Court has rejected that portion of the English common law which held that defects such as improper indictments prevented jeopardy from attaching at the first prosecution. Moreover, this Court

(continued)

Appellants' contention that jeopardy does not attach at the master's hearing necessarily raises the question of when it does first attach. According to their analysis, jeopardy first attaches when, at either a *de novo* hearing or a hearing on the record, the juvenile court judge begins to hear evidence. Brief of Appellants at 23.[151] This reasoning would permit the reprosecution of a child for the same offense again and again in the juvenile court without offending double jeopardy principles so long as each trial takes place before a master and the involvement of the judge is limited to *ex parte, in camera* review of the master's findings and recommendations.[152] Since relatively few cases that are set

(footnote continued from preceding page)
has long held that the need to protect against the strain, embarrassment, and expense of a criminal trial requires double jeopardy protection broader than the common law pleas of former conviction and former acquittal. See the discussion *supra*, at 35-37. Given these major changes in the law of double jeopardy as it has developed in this country, it is doubtful that past history alone should require adherence to the rule that jeopardy may not attach in the absence of subject matter jurisdiction.

[151]Referring to situations in which the State seeks a hearing before the judge on exceptions, appellants claim that jeopardy first attaches when the judge "receives the case from the masters. . . ." Brief of Appellants at 23. Appellees assume that "receives the case" means receiving evidence.

[152]Conceivably appellants really meant to say that jeopardy may also attach in a case where no exception is taken, but that such attachment does not occur until the judge reviews the recommendation and signs the master's proposed order. Under this reasoning, some of the excesses of appellants' position would be avoided. However, even this modified approach is constitutionally impermissible. At a minimum, it is simply a resurrection of the common law rule, long since rejected in this country, that jeopardy attaches at the conclusion of the trial, not at the beginning. See the discussion *supra*, at 45. Although the common law view was followed in Maryland, *see Hoffman v. State*, 20 Md. 425, 434 (1863), the Maryland courts have recognized that that view did not survive *Benton v. Maryland. See Baker, Whitfield & Wilson v. State*, 15 Md. App. 73, 78, 289 A.2d 348, 351 (1972).

in originally before the master ever reach the judge for a *de novo* or on the record hearing because exceptions are taken,[153] only a very small percentage of children who are tried in the juvenile court would ever be in a position to invoke double jeopardy protections regardless of how often they are tried in that court for the same offense.[154]

III. A SECOND HEARING BEFORE THE JUVENILE COURT JUDGE, FOLLOWING A TRIAL IN WHICH THE MASTER HAS FOUND THE CHILD TO BE NOT GUILTY, IS AN IMPERMISSIBLE SECOND JEOPARDY

Since it is clear that jeopardy attaches initially when the master, as fact-finder, begins to take evidence, the only remaining issue is whether the hearing before the judge constitutes a second jeopardy and is, therefore, forbidden

[153]In calendar year 1974, the judge presided over eighty adjudicatory hearings prompted because exceptions were taken to a master's finding. During the same period, masters presided over 5,345 adjudicatory hearings. See P.Ex. 39, 40 at A.29,32.

[154]In further support of their position that jeopardy does not attach at a master's adjudicatory hearing, appellants point out that no jeopardy attaches at a bail hearing, preliminary hearing, grand jury proceeding, or arraignment even though the defendant is required to marshal his resources and suffer the embarrassment, expense, and ordeal of defending himself. Appellants point out the absurdity of the contention that those proceedings invoke double jeopardy protections since in each of them the defendant "has not been *tried* before a court of competent jurisdiction." Brief of Appellants at 20. The very word that appellants italicize explains why jeopardy does attach at the adjudicatory hearing—it is the proceeding at which the child is *tried*.

by the double jeopardy clause.[155] There is no doubt that a second hearing held before a criminal court judge would be barred by double jeopardy under the narrow holding of *Breed v. Jones*, 421 U.S. 519 (1975). What must be decided is whether the second hearing before the juvenile court judge should be treated differently from the second hearing in *Breed* under a theory that the two juvenile court hearings are really one continuous hearing.

The only conceivable basis for claiming that the two juvenile court hearings merge when one party excepts to the master's findings and seeks a new hearing before the judge, is that the proposed order which the master submits is not signed by the judge. In considering the merits of that claim, appellees point out initially that if a child were found to be either guilty or innocent by a juvenile court judge, he could not, according to *Breed*, be tried on the same charge by another juvenile court judge.[156]

Since the argument in the instant case opposing attachment of a second jeopardy in a proceeding before the judge turns on the meaning of the phrase "continuing jeopardy," an analysis of those words is in order. Appellees have previously noted that that phrase has come to stand for several propositions and, hence, causes confusion.[157] The

---

[155]Appellees discuss *infra*, at 86-92, where there is any difference, for double jeopardy purposes, between a *de novo* hearing and a hearing on the record.

[156]*M. v. Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); *People v. P.L.V.*, 176 Colo. 342, 490 P.2d 685 (1971). See the discussion *supra*, at 48-49.

[157]See *supra*, at fn.100.

words are commonly associated with Mr. Justice Holmes' dissent in *Kepner v. United States*, 195 U.S. 100, 134-37 (1904) in which he stated that jeopardy should continue until all proceedings against a defendant are finally resolved. As used in that dissent, the concept has repeatedly been rejected. *See Breed v. Jones*, 421 U.S. at 534. The other use of this phrase—to indicate the justification for retrying a defendant who successfully attacks his conviction on appeal—is a much narrower and analytically distinct concept which has no relevance to the instant case. Appellants confuse the issue by stating "continuing jeopardy" was first given implicit recognition in *United States v. Ball*, 163 U.S. 662 (1896), Brief of Appellants at 23. The theory recognized in *Ball* only goes so far as to allow reprosecution when the defendant himself initiated a successful appeal of his conviction. This confusion is magnified by appellants' subsequent statement that "continuing jeopardy" was considered in *Kepner*. Brief of Appellants at 24. Clearly the theories considered in each case are vastly different and should not be lumped together. To the extent that "continuing jeopardy" is relevant to the instant case, it is the type formulated by Mr. Justice Holmes and repeatedly rejected by this Court.

Appellants attempt to distinguish this Court's uniform rejection of the Holmes "continuing jeopardy" concept by claiming that the proceedings before the master and judge are even more "continuing" and less interrupted than proceedings in earlier cases that have rejected "continuing

jeopardy."[158] To support their contention that the master and judge hearings are continuous and uninterrupted,[159] appellants invoke the same argument that they presented earlier to support the view that no jeopardy attaches at the master's adjudicatory hearing. Thus, appellants stress that the master's recommendation of non-delinquency may not be equated to an acquittal or dismissal since it is not final. Brief of Appellants at 26, 28-29. Quoting from *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), which concluded that resolution of the question of whether there has been an acquittal should be determined, not by a label, but by whether some or all of the factual elements of the offense charged have been resolved, appellants claim that the master's findings do not represent such resolution since they are conditional and may be rejected by the judge. Brief of Appellants at 29-30.

Appellants' attempt to circumvent the discredited "continuing jeopardy" doctrine flies in the face of the overwhelming evidence in the record. Clearly, the decision of the master at the adjudicatory hearing does represent a resolution of the factual elements charged in the offense

[158]See Brief of Appellants at 25, 29. Appellants also seek to gain acceptance for the Holmes view by suggesting that this Court in *Breed* left the door open for the application of the "continuing jeopardy" concept in a future case if the interest of society or the juveniles themselves would justify the cost of carving out an exception to normal double jeopardy rules. To the extent that appellants believe that the instant case presents the occasion, appellees point out, *infra*, at 92-98, why the occasion has not yet arrived.

[159]In the cases of the six appellees who appeared before the judge at a second hearing, the average time span between the first and second hearing was just under two months. See P.Ex. 44-48, at 1; P.Ex. 49, at 3, 4, 6, 8, 16.

and, under any realistic assessment, is just as "final" as that made by the master in *Breed*. To conclude otherwise is to make the double jeopardy protection slave to a technical, automatic, and meaningless signature that the judge routinely places on the order form submitted by the master. But even if it can be assumed that, for double jeopardy purposes, the action of the master is not sufficiently complete to be designated as "final" for purposes of the attachment of a second jeopardy, the double jeopardy clause is nonetheless violated because the State, by taking an exception, prevents the child's trial from being completed. The State then profits from this action because it receives a second, and constitutionally impermissible, crack before another judicial officer.

A. The Finding of a Juvenile Court Master, Whatever Its Label, That a Child Is Not Guilty of the Offense Charged, Should Be Viewed for Double Jeopardy Purposes as Concluding the First Jeopardy, Thereby Precluding any Further Attempt by the Prosecutor to Obtain a Guilty Verdict on the Same Charge Before Another Judicial Officer

Given the role that the master actually plays in the Baltimore City juvenile court, and the nature of the judge's review of the master's work, it is clear that at the end of the master's adjudicatory hearing there is a final resolution of the issue of innocence or guilt. To require the signature of a judge on a printed order form before concluding that the first jeopardy has come to an end is to exalt form over substance in a matter wholly inconsistent with this Court's teachings in cases developing the constitutional rights of

juveniles and the parameters of double jeopardy protections. *See In re Gault*, 387 U.S. 1, 50 (1967); *In re Winship*, 397 U.S. 358, 365 (1970); *Green v. United States*, 355 U.S. 184, 198 (1957); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 582 (1977) (majority and dissenting opinions). Moreover, the decisions of this Court do not require a signed order of the judge as a condition precedent to concluding an initial jeopardy.[160]

1. In the Absence of Exceptions by the Parties, the Issue of Innocence or Guilt Is, in Every Meaningful Sense, Final When the Master Announces His Findings at the Conclusion of the Adjudicatory Hearing

Appellees have previously described generally the role of a master at an adjudicatory hearing and the numbers and kinds of cases which are heard by the seven masters and one judge in Baltimore City.[161] From that evidence alone, it is clear that describing the master as merely an "advisor" on the issue of innocence or guilt is a fiction. A closer look at how his role is perceived by those who appear before him and the extent to which the judge becomes involved in the adjudicatory process[162] further support this conclusion.

To the child and his parent, the role of the master in conducting the adjudicatory and disposition hearing[163]—

[160]This point is discussed *infra*, at 78-80.

[161]See *supra*, at 21-30.

[162]Appellees are not speaking here of cases that the judge hears originally or on exception.

[163]See *supra*, at 25-27.

and in taking actions which immediately affect the child's liberty[164]—is so important that any practical difference between his role and that of the judge is totally obscured. The parent and child view the master as "judge" (A.23, 26; T.I. 255-56) and regard the adjudicatory hearing as a trial (A.26).[165] When the master announces his findings at the conclusion of the adjudicatory hearing, both parent and child react as though his decision was final. In the words of one master:

> Normally, it's a reaction to the realization that I have decided that the youngster did or he didn't do it. The reactions may be from the complaining witness or from the respondent. Usually, he is happy if his charge is not sustained. He's said if it is. . . . If [at the disposition hearing] I'm recommending detention, the youngster may cry. He may get upset. His parents might get emotionally upset. A.22.[166]

Ruth Kent, the mother of one of the appellees, testified that after the master announced that her son was not guilty, "I thought the case was over with and that I could take my

[164]See *supra*, at 28-30.

[165]The court in *Aldridge v. Dean* found that the child and his family justifiably regard the adjudicatory hearing as a trial since the master not only announces his findings on the issue of innocence or guilt but often causes the child to be either released from or taken into custody without waiting for any order of the judge. 395 F. Supp. at 1171 (Finding 28).

[166]Another master stated that, both when he served as a public defender and appeared before all of the masters, and in his capacity as master, he observed similar reactions from the child and his parent (A.54). He "frequently heard statements from [the child] and his family at the conclusion of the master's adjudicatory hearing that they were relieved that the trial was over." (A.54).

son home and we could continue to live normal lives." (A.24). Her son told her that "he was glad that it was all over with because it was a long process of the procedures of the trial." *Id.* The parent of another appellee expressed similar views: "We was happy and relieved that it was all over with, so we thought everything was all over and we just left the courtroom and went home." (A.26).

That the respondent and his family view the master's findings as being final is particularly clear from their reactions when they discover that the case has not been concluded at all. The mother of one appellee stated that when she received a notice to report to court again:

> I was totally upset. I could not understand getting a second summons in the mail stating that I would have to appear in Court for the second time, when at the first time that the case had been dismissed, my son was let go and, then, to be humiliated again, to go to Court and be subjected under those types of conditions, I was really upset, to no end. A.25.[167]

While such reactions by the juveniles and their parents to a judicial proceeding do not, alone, determine whether jeopardy attaches or ends, they are helpful in realistically assessing the true nature of the master's role at the

---

[167]The parent of another appellee stated that when she received another notice to bring her son back to court, she was

> very upset because I knew William hadn't did anything else and I was wondering what was wrong, so I also worked for an attorney, so I called him and I asked him could he be tried for the same thing twice. A.26.

adjudicatory hearing.[168] Since the double jeopardy clause seeks, *inter alia*, to protect the defendant from having "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense," *Abney v. United States*, 431 U.S. 651, 661 (1977), the fact that the child and his parents suffer at the master's adjudicatory hearing in the same manner that an adult would in a criminal trial is relevant in determining how, for jeopardy purposes, the master's hearing should be characterized.[169]

The view of the parent and child that the master's adjudicatory hearing is a trial at which the juvenile's fate is determined is fully supported by evidence showing the role that the judge plays in determining that fate. As already noted,[170] the ability of the judge to play any meaningful role during or after the master's hearing is extremely limited by

---

[168]In their Brief at 19, appellants argue that the court below determined that jeopardy attached at the master's hearing because it engendered elements of anxiety, insecurity, and strain. That, according to appellants, puts the cart before the horse since other kinds of hearings that are held prior to trial also engender such elements but do not invoke double jeopardy protections. Appellants misconceive the district court's reasoning, which is that jeopardy has attached because the *trial* has commenced. The court's reference to elements of anxiety, insecurity, and strain were made in rebuttal of appellants' position that jeopardy cannot attach because the master cannot enter a final order. In other words, the court below was merely pointing out that these personal elements are present whether or not the master, himself, signs a final order.

[169]The parents of two appellees further testified concerning the monetary costs incident to having to appear for a second time before the judge (A.25, 28).

[170]See *supra*, at 27-28.

the enormous case loads of the masters and by the fact that the judge, himself, has a full docket of hearings as well as major administrative responsibilities. Thus, it would be surprising if the judge had more than a minimum amount of time remaining after fulfilling his other duties, to consider masters' findings and to contemplate the thousands of proposed orders he receives each year.[171] In addition to sheer time and case load considerations, or perhaps because of them, the established procedures by which the judge passes on the actions of the masters ensure that his role is perfunctory and formal only.

Of the various sources of information available to the judge in making his review of the master's findings and recommendations, the most valuable and convenient is the master himself.[172] Yet the judge virtually never speaks with

[171]See P.Ex. 41 at A.33; *Aldridge v. Dean*, 395 F. Supp. at 1170 (Finding 15).

[172]The master's proceedings are now recorded by tape recorder. See *supra*, at fn.79. While the tape would theoretically contain the most accurate account of the proceedings, the practical difficulties of deciphering words that may be spoken by more than one person at once into four microphones (A.44) cause tape recordings to be less than ideal devices for conveying information. *See* Rodebaugh, *The Court Reporter vs. The Recording Machine—A Review of the New York Experiment*, 18 PRAC. LAW., No. 8, 69 (1972). In any event, it would require more than 24 hours each day for the judge to listen to all the tapes in their entirety that are made in each of the seven masters' courtrooms every day. It is, therefore, obvious that the judge cannot use the tapes in order to routinely review the masters' decisions. The judge who sat in the juvenile court after recording systems were introduced in 1975, stated that where he "feels the need, although this is done very infrequently, he actually will review a tape of the proceedings prior to signing a recommended order." (A.48-49). A close reading of his statement does not reveal that there actually ever was an occasion when he felt "the need".

masters regarding specific cases while they are pending before him (A. 21; T.I. 116-17, 151, 275-76). Indeed, from the summer of 1975, when a new judge was assigned to the juvenile court (A.44),[173] until the most recent period covered by the record,[174] six of the masters never discussed with the judge a single case that was pending either before them or before the judge (A.44, 49, 51). The seventh master on one occasion, and at his initiative, spoke to the judge about a case that was pending before the master, but the conversation did not discuss the facts of the child's adjudication or disposition (A.53). Like the other masters, he was never sought out by the judge to discuss a case (A.54).

Other possible sources from which the judge could draw information about the master's hearing have proved to be of little or no use. To the extent that masters take notes that they do not discard at the conclusion of a hearing, they do not send or otherwise bring these notes to the attention of the judge except in the rarest circumstances (A.13-14, 17, 53; T.I. 184, 275-76). Although the proposed order is submitted by the master to the judge for signature, it is a printed form that conveys no information whatever about the case except for the child's name and the petition number.[175]

[173]From May, 1967, until the summer of 1975, the juvenile court judge was the Honorable Robert I.H. Hammerman (A.44; T.I.93). He was succeeded by the Honorable Robert Karwacki (A.44-45) who served as juvenile court judge until September, 1977. *See* The Daily Record, Sept. 19, 1977, at 3, col. 4.

[174]See *supra*, at 15.

[175]See P.Ex. 51-62, 66-68. When several of the printed order forms were revised in 1975, even the words "master's report" were removed. Compare the aforementioned exhibits with P.Ex. 13, 15-17, 19, 30-32 and 34. This latter group of forms is no longer in use (T.II. 34-35). Illustrative of the proposed orders in the instant case are P.Ex. 5(E), 7(H), and 8(M).

The court file is likewise of no help to the judge since the bulk of material that it contains is papers which are strictly procedural in nature.[176] In any event, the judge virtually never sees the papers contained in the court file since it is very rarely submitted to him with the proposed order (T.I. 106, 150).

The written findings of fact, conclusions of law, and recommendations of the master which, pursuant to §3-813(b), must be filed with the court within ten days after the hearing,[177] could potentially prove the most useful to the judge in his review. However, after §3-813(b) was enacted in 1975[178] a written form was prepared whereby the parties could waive their right to receive written findings of fact and conclusions of law.[179] Except in those cases in which a child is detained for diagnostic evaluation[180] or in which the child is found delinquent and committed to an institution, it is very rare that the waiver form is not executed and, hence, no written findings and conclusions prepared (A.44, 48, 53;

[176]See P.Ex. 1-9. Although the file includes a juvenile court petition on which the procedural history of the case is recorded, it contains no recitation of the evidence produced at the master's hearing (T.I. 181-82). See, *e.g.*, the reverse side of P.Ex. 1(A).

[177]Rule 911.b states that the written report shall be filed "with respect to adjudication and disposition". It would appear that the quoted language, which was added effective Jan. 1, 1977, *see* 3 Md. Reg. 1385 (1976), makes unnecessary a report when the petition is dismissed and no disposition hearing takes place. As noted in the text, *infra*, actual practice conforms to this interpretation.

[178]*See* 1975 Md. Laws, Ch. 554.

[179]The written waiver form is included in the record as P.Ex. 63.

[180]These evaluations are made at the Maryland Children's Center. *See* Ann. Code Md., Art. 52A, §12 (1977 Cum. Supp.).

T.II. 17-19).[181] Since commitment is recommended in only a modest percentage of cases,[182] no written memorandum accompanies the proposed order submitted to the judge in the bulk of cases. Thus, the statutory requirement that written findings and conclusions be submitted is largely illusory. Indeed, since the statutory requirement went into effect, the percentage of cases in which a written memorandum of findings and conclusions has been submitted to the judge has actually declined. (T.II. 19-20).[183]

Although memoranda are submitted to the judge in commitment cases, they are normally brief[184] and frequently have so little information in them concerning the

[181]If the master recommends commitment of a child who is already committed as a result of an earlier charge, he would not typically prepare a written memorandum but instead would have the parties execute a waiver form (T.II. 16).

[182]See P.Ex. 50, 74 which, *inter alia*, show the number of children placed on probation and committed to institutions for calendar years 1974 and 1975, respectively.

[183]Prior to the enactment of §3-813(b), memoranda had been submitted in no more than one-quarter to one-third of the cases in which a proposed order was submitted (T.I. 106 B). At that time, the current practice of submitting memoranda in cases in which children are detained for diagnostic evaluation or are committed was also followed (A.18; T.I. 120, 152; T.II. 17). The reasons that memoranda are now submitted in a smaller percentage of cases than they were prior to the passage of §3-813(b) are 1) that formerly masters as well as the judge presided at waiver cases (submission of a memorandum was more common in waiver hearings than in other hearings (T.II. 20)), and 2) most masters no longer follow the former practice of sending the judge memoranda in detention cases unless the child is detained for diagnostic evaluation (A.18, 43, 44, 51, 53).

[184]The average memorandum is between one and one and a half pages in length (T.I. 118). *See Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 23). For an example of such a memorandum, see P.Ex. 5(F).

commission of the offense itself that it would be difficult if not impossible for the judge to have any understanding of the nature or amount of evidence presented at the adjudicatory hearing (A.10, 53; T.I. 152-53).

In view of the demands on the juvenile court judge's time, the enormous case loads, and the rather minimal amount of information available to him when he receives proposed orders from the masters, it is not surprising that the judge's review is perfunctory at best (A. 9-10; T.I. 154-55). Although memoranda which are submitted by the masters in certain cases give the judge a somewhat greater opportunity to review disposition (A. 49; T.I. 120), on the whole the judge has little time or practical ability to conduct meaningful review of any of the masters' findings and recommendations (A. 9-10; T.I. 154-55). In the companion habeas corpus cases, the district court found:

> The evidence shows and the State does not deny that, on the average, the judge devotes a little less than one minute to each proposed order. *Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 24).

The perfunctory nature of the judge's reviewing function is revealed by the fact that virtually 100 percent of the orders submitted by masters are signed by the judge without modification (A.10).[185]

[185]The judge who presided in the juvenile court for eight years (T.I. 93) testified that on no more than four to nine occasions a year did he modify or remand a master's findings and recommendations (A.10). He further stated that in a majority of those four to nine occasions, he made the modification because an individual did not follow the normal route of taking an exception but instead spoke with him about the master's recommendation (A.11). *See Aldridge v. Dean*, 395 F. Supp. at 1171 (Finding 25).

The evidence in the instant case fully supports the conclusion of the juvenile court judge who first addressed the issue before this Court:[186]

> [I]t is absolutely clear, and this Court knows only too well, that it is impossible for the Judge of the Juvenile Court of Baltimore City, who also carries a full docket of cases himself, to exercise any independent, meaningful judgment in the overwhelming majority of the many thousands of orders put before him each year—and that for the most part the signature—the stroke of finality—is no more than a perfunctory act. With this being the case it is difficult to see how realistically a Master can be called only an adviser, one who conducts only informal hearings and one whose powers and sanctions are nonexistent.
>
> * * *
>
> [I]t certainly appears that the Master conducts, for all intents and purposes, full blown and complete proceedings through the adjudicatory and dispositional phases and that as a practical matter he imposes sanctions and can effectively deprive youngsters of their freedom. *Matter of Anderson*, No. 158187 (Cir. Ct. of Balto. City, Div. for Juv. Causes, August 1, 1973) at 39.[187]

This view was recently reiterated by the Commission on Juvenile Justice which spent 18 months studying, *inter alia*, the operation of the juvenile courts in Maryland. In its final

[186]Having served from 1967-1975 as the only juvenile court judge in Baltimore City, and being one of only three full time juvenile court judges in the State of Maryland (T.I. 93-95), the Honorable Robert I.H. Hammerman was uniquely qualified to speak to the matter.

[187]See *supra*, at fn.14.

report to the Governor and the General Assembly of Maryland, the Commission unanimously concluded:[188]

> All recommended orders of a master must be reviewed and signed by a juvenile court judge. The judge is deprived of the personal appearance before him of the parties and witnesses in making assessments as to the credibility of testimony. Additionally, the time constraints of heavy caseloads which justify the use of masters, also mean that the judge can usually give masters' reports no more than cursory reviews. So, without bearing legal responsibility for his decisions, the Master's recommended decisions become, in effect, final orders of the Court. FINAL REPORT OF THE COMMISSION ON JUVENILE JUSTICE TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF MARYLAND (Jan. 1, 1977) at 12-13.[189]

2. The Finality Required for Initial Jeopardy to Terminate Is Not Dependent upon the Mere Technicality of the Judge's Signature on a Master's Proposed Order

If, as appellees contend, the master's finding of innocence or guilt is final as a matter of practice, all that keeps it from being technically final is the absence of the judge's signature on a proposed order form. However,

[188]Three members of the Commission filed a dissenting report on an unrelated issue.

[189]During his tenure as Chairman of the Commission, the Honorable Robert Karwacki also served as the Baltimore City juvenile court judge, having succeeded the Honorable Robert I.H. Hammerman. *See* FINAL REPORT at ii.

initial jeopardy may end even in the absence of a court's judgment or order formally discharging the defendant. *United States v. Ball*, 163 U.S. 662 (1896) illustrates this principle. In that case, a verdict of acquittal had been returned by the jury on a Sunday, and the trial court entered an order the same day discharging the defendant. He was subsequently retried and found guilty. Although noting that the order discharging Ball at the conclusion of the first trial was void since no judgment could lawfully be entered on Sunday, the Court ruled:

> However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense. 163 U.S. at 671.

Accord, Kepner v. United States, 195 U.S. 100, 130 (1904).

Admittedly, the trial judge is prohibited from overriding a verdict of acquittal in a jury trial where "the primary finders of fact are the jurors." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). While the verdict of acquittal in *Ball*, therefore, could not have been disturbed by the judge in any event, the findings of juvenile court masters—who are also the "primary finders of fact"—theoretically may be not only disturbed but also ignored by the judge.[190] Nevertheless, *Ball*

[190]To the extent that the judge enters findings other than those recommended by the master, Fourteenth Amendment due process problems may be created. Unlike the master, the judge would have no opportunity to listen to live testimony, assess credibility, or study demeanor of witnesses. The problem was dramatically illustrated by the court in *United States v. Ricoy*, No. 7 Estafa (Ct. of 1st Instance for

(continued)

demonstrates that there is nothing magical, for double jeopardy purposes, in the fact that the proceedings have not yet reached the point of absolute finality that occurs when a judicial order is entered dismissing the juvenile court petition or, in adult court, when a judgment discharging the defendant is signed.

B. A Second Hearing Before the Judge Offends Double Jeopardy Principles Even if Masters' Findings That Have Not Been Signed by the Judge Are Viewed as Insufficiently Final to Terminate the First Jeopardy

As discussed previously,[191] double jeopardy principles that have developed in this country recognize that even

(footnote continued from preceding page)
City of Manila, Aug. 20, 1903), reprinted in Brief for Plaintiff in Error in *Kepner v. United States*, 195 U.S. 100 (1904) at 49 *et seq.*:

> Suppose a man is accused in Zamboanga and brought before a Judge of the Court of First Instance, given a right to cross-examine the witnesses there examined, and is acquitted by the Judge of the Court of First Instance. The case is appealed by the prosecution to the Supreme Court of the Philippine Islands. In Manila, five hundred miles away from where the accused may be in jail, by judges who have never seen him, and whom he has never seen, he is convicted upon evidence given by men whom the judges that convict have never seen, and not one of the witnesses has ever seen the judges that convict. The theory of the prosecution seems to be that that man has been confronted by the witnesses at the trial. *Id.* at 60.

For a full discussion of this issue, see Brief of the State Public Defender of California as Amicus Curiae in Support of Appellees in the instant case.

[191]See *supra*, at 38.

when the first trial does not run its full course, a second trial is permitted only if the reason for the aborted first hearing is justified under the "manifest necessity" doctrine of *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). Under this doctrine, a hearing before the judge may offend the double jeopardy clause even if the master's findings are not viewed as having the requisite finality necessary to terminate the first jeopardy at the point when the master concludes that the juvenile is either innocent or guilty.

In view of the automatic nature of the judge's approval of the masters' findings,[192] it is obvious that, but for the intervening act of the State in filing exceptions, the judge would have approved the master's findings in each of the appellees' cases.[193] Thus, by filing exceptions, appellants

[192]See *supra*, at 76-78.

[193]An examination of the court files of each of appellees' cases lends dramatic proof to this statement. On the back of the petitions in each case, there is a printed form where entries are made showing the procedural history of the case (T.I. 190-92). On the petitions in the cases of seven of the appellees, next to the word "order," is written the word "dismissed." See P.Ex. 1(A), 2(N), 3(F), 4(N), 6(U) (V), 7(N), and 9(V). Although the court files in several of the appellees' cases contain no order forms submitted to the judge, their absence is explained by the fact that for a considerable period of time orders were normally not submitted to the judge in cases in which the master decided that the petition should be dismissed (T.I. 364-68). Thus, absent exceptions filed by the State, the notation "dismissed" on the back of the petition would have terminated all further proceedings in the cases. In the files of two of the appellees, however, an order of dismissal was actually submitted to the judge who, in each case, signed it. See P.Ex. 5(E), 7(H). Moreover, orders dismissing the petitions were apparently signed in the cases of two other appellees although the record does not include copies. *See Matter of Anderson*, 20 Md. App. 31, 50-51, 315 A.2d 540, 551 (1974). Admittedly, those orders were prematurely signed since the time for the State to take an exception had not yet run. *See In re Appeal No. 287*, 23 Md. App. 718, 329 A.2d 420 (1974). Nevertheless, the fact that the orders *were* signed is conclusive proof that, but for the filing of the State's exceptions, these appellees would have been finally adjudicated not guilty.

caused each master's hearing to abort at its very end, immediately before the findings would almost certainly have been approved by the judge.

This Court's "manifest necessity" decisions demonstrate conclusively that no legal justification exists to deprive appellees of their "option to go to the first [fact-finder] and, perhaps, end the dispute then and there with an acquittal." *United States v. Jorn*, 400 U.S. 470, 484 (1971). In *Illinois v. Somerville*, 410 U.S. 458 (1973), this Court emphasized that when a trial is aborted, the defendant may invoke the double jeopardy protection when there is no "important countervailing interest of proper judicial administration." 410 U.S. at 471. Appellants' interest in causing the trials to be aborted[194] stems exclusively from their dissatisfaction with the masters' views on the facts and the law[195] and their desire to have another opportunity to prove appellees' guilt. However, as this Court said in *United States v. Wilson*, 420 U.S. 332 (1975), the prosecutor is not permitted to "seek to persuade a second trier of fact of the defendant's guilt after having failed with the first. . . ." 420 U.S. at 352.

The appellants sought to prevent each trial from reaching a conclusion terminating in a final order, not merely because it was going badly, *see, e.g., Gori v. United States*, 367 U.S. 364, 369 (1961), but because it had already been *lost*; all that was necessary for total finality was the stroke of a pen.[196] When a trial has progressed to

[194]Since appellees' actions did not cause or contribute to the trials not being finally concluded, the principles set forth in *United States v. Dinitz*, 424 U.S. 600 (1976) have no application. *See also Lee v. United States*, 432 U.S. 23 (1977).

[195]See P.Ex. 49 at 3-5, 7, 9, 12, 14-16.

[196]See *supra*, at 77-78.

the point of virtual finality, the need to protect the defendant from reprosecution is much greater than when it is aborted near its start.[197] *See United States v. Gentile*, 525 F.2d 252, 256 n.2 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); Schulhofer, *Jeopardy and Mistrials*, 125 U.PA. L. REV. 449, 507-11 (1977).

In these circumstances, the defendant has already been exposed to the strain and embarrassment of a complete trial, and the Government is past the point of speculating whether it will win or lose. The prosecutor's desire to hale the defendant before a new fact-finder to litigate the issue again is not the kind of countervailing interest of proper judicial administration which allows the invocation of the "manifest necessity" test. *See Ashe v. Swenson*, 397 U.S. 436, 446 (1970); *United States v. Jorn*, 400 U.S. at 482; *Gori v. United States*, 367 U.S. at 369; *United States v. Wilson*, 420 U.S. at 344.

The benefits to the appellants of a second opportunity before a new fact-finder are revealed by examining the trials of two of the appellees. At the initial trial of appellee Witherspoon, both the victim of a housebreaking and the police officer who interviewed the child at the police station testified (A.41-42). Although the child had confessed to the policeman,[198] the confession was not admitted in evidence after the child's mother testified that the waiver of rights

[197]*Compare Illinois v. Somerville*, 410 U.S. 458 (1973), in which the trial was aborted in the earliest stages before any witnesses had been called, *with Klinefelter v. Superior Court of Maricopa*, 108 Ariz. 494, 502 P.2d 531 (1972), in which a mistrial was declared 5 to 10 minutes before the end of a two day trial.

[198]See P.Ex. 9(T).

form that her son signed and the explanation given by the police were not understandable (A.42). In the absence of direct testimony implicating the child and because of questions concerning intelligent waiver of counsel at the police station, the master found the child not guilty (A.42).

Disagreeing with the master's assessment of the mother's testimony, the state's attorney filed an exception (A.42), and Witherspoon was retried before the judge. At the second hearing, the State presented a new witness who claimed that Witherspoon had confessed to him concerning the break-in (A.35-36). In addition, the police officer was called and allowed to present Witherspoon's confession (A.36-37). Defense counsel, however, did not present the mother's testimony on the question of whether the child had intelligently waived counsel because she was working and unable to be at the hearing (A.36-37). Defense counsel, however, did not present the mother's testimony on the question of whether the child had intelligently waived counsel because she was working and unable to be at the hearing (A.37-38). At the conclusion of the hearing the judge found the child guilty (A.39), and eventually committed him to an institution. See P. Ex. 9(A).

The second chance to prosecute enabled the State to strengthen its case with the testimony of a new witness who directly implicated Witherspoon and with additional testimony by an earlier witness concerning the confession. At the same time, the defense case was weakened because of the absence of a witness who had given key testimony at the hearing before the master.[199] Strengthening of the

[199]Even if Witherspoon's mother had been present and testified at the hearing before the judge, he might have viewed her testimony in a light less favorable to the defense case than did the master and might therefore have still permitted the introduction of the confession into evidence.

prosecution's case is not a proper justification for retrial under the "manifest necessity" doctrine. *See Illinois v. Somerville*, 410 U.S. at 469.

The *McLean* case illustrates what may happen even when the evidence presented to the second fact-finder is exactly the same as that presented to the first.[200] At the hearing before the master, the State presented the testimony of a 14 year old boy who claimed that McLean and another boy robbed him of his bicycle.[201] The victim further stated that he had not known McLean prior to the incident, although he had known the other youth.[202] In addition, a police officer testified that he spoke with McLean who denied any involvement.[203] The defense called no witnesses.[204] At the close of evidence, the master found McLean not guilty because he was not satisfied beyond a reasonable doubt of the accuracy of the witness' identification.[205] Disagreeing with the master's finding on the identification issue, the prosecutor filed an exception and obtained a new hearing before the judge.[206] At the new hearing, the same evidence was presented.[207] This time,

[200]To the extent that Maryland law, at this moment, requires that the evidence presented to the second fact-finder be on the record, see *supra*, at fn.39, the *McLean* case illustrates the unconstitutionality of that procedure as well.

[201]See P.Ex. 48 at 3-8; P.Ex. 49 at 16.

[202]See P.Ex. 49 at 16.

[203]*Id.*

[204]*Id.*

[205]*Id.*

[206]*Id.* See also P.Ex. 7(G).

[207]See P.Ex. 48 at 3-20. At the hearing before the judge, the State did not call the police officer, no doubt because at the first hearing he presented no useful information.

however, the second fact-finder evaluated the same evidence and concluded that he was convinced beyond a reasonable doubt that the victim had identified the right individual.[208]

Whether the master or the judge in the *McLean* case was more correct in assessing the worth of the victim's identification testimony is, of course, beside the point. The fact is that the most conscientious judicial officers can differ as to what constitutes reasonable doubt in a particular case and as to the interpretation of that concept. It is only logical to assume that if a case is tried before enough judicial officers, one of them will eventually conclude that the defendant is guilty beyond a reasonable doubt.[209] However, such a process would emasculate this Court's decision in *In re Winship*, 397 U.S. 358 (1970). *See also North Carolina v. Pearce*, 395 U.S. 711, 734-35 (1969) (Douglas, J., concurring).

IV. THE SECOND HEARING DOES NOT ESCAPE CONDEMNATION UNDER THE DOUBLE JEOPARDY CLAUSE SIMPLY BECAUSE IT IS ON THE RECORD INSTEAD OF DE NOVO

Following the decision in *Aldridge v. Dean*, 395 F. Supp. 1161 (D.Md. 1975), the court rule which permitted the State to seek a hearing *de novo* before the judge was modified to provide that the hearing should be on the record, supplemented by such additional evidence as the

[208]*Id.* at 21-22.

[209]*See* Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 280-81 (1972).

judge considers relevant and to which the parties do not object.[210] Assuming that the amended rule presently states the correct procedure for exception hearings,[211] this alteration does not save the rule from unconstitutionality under the double jeopardy clause. Admittedly, restricting the State to the evidence it has already presented prevents it from strengthening its case by presenting either new witnesses or more thorough accounts from earlier witnesses. But there are other ways that the prosecutor may strengthen his case which are not precluded by restricting the hearing to the record. For example, the prosecutor might conclude that his witnesses, when viewed through the medium of a transcript or a tape recorder, will seem more credible than when viewed in person, or that testimony of defense witnesses might be less impressive when presented on the record than it was when presented live.[212] Indeed, it is commomplace for a trial lawyer to make judgments as to whether to call a witness based not simply on his assessment of the witness' credibility but on how he thinks the fact-finder will assess that witness.[213]

Furthermore, the prosecutor may strengthen his case by making new and improved arguments before the judge at the second hearing after the judge has listened to or studied

[210]See the discussion *supra*, at 14-15.

[211]See the discussion *supra*, at fn.39.

[212]The important role that personal observation plays in assessing the reliability of witnesses is discussed in the Brief of The State Public Defender of California As Amicus Curiae in Support of Appellees, at 18-26.

[213]*See* H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING, 50-51 (1972); 2 A. AMSTERDAM, B. SEGAL, & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, §278 (2d ed. 1971).

the evidence.[214] Moreover, defense counsel may prove to be less effective at the second hearing than at the first in referring to evidence or making legal arguments.[215]

Assuming that the evidence and arguments presented at the second hearing are identical to those presented at the first, there remains the most fundamental objection to permitting the child to stand trial a second time—the possibility that a second fact-finder will simply take a different view of the evidence and find the child guilty.[216]

[214]The rule which authorizes hearings on the record, Rule 911, does not define "the record." However, Maryland's highest court has ruled that a record on appeal should not contain arguments of counsel. *Silverberg v. Silverberg*, 148 Md. 682, 694, 130 A. 325, 329 (1925). *See also* Rule 1326. To the extent that arguments made by counsel are not deemed part of the record presented to the judge at the second hearing, defense counsel would have an absolute right to make an argument, *see Herring v. New York*, 422 U.S. 853 (1975), and it is hard to believe that the judge would refuse the State a similar right.

[215]Indeed, in a large urban area where the vast majority of children tried in the juvenile court are represented by a public defender's office (A.47), the juvenile may have a different lawyer at his second hearing. Each of the appellees who was tried a second time was assigned a lawyer other than the one who handled the case before the master. Compare the reverse side of P.Ex. 1(A), 3(F), 5(N), 7(N), 8(S), and 9(V) with the cover pages of P.Ex. 44-48.

[216]To the extent that the juvenile court judge at the hearing on the record is free to exercise his independent judgment on the issue of innocence or guilt without being restricted by the clearly erroneous standard normally employed by appellate courts (*e.g.*, Fed. R. Civ. P. 52) or by trial courts reviewing findings of masters in chancery (*e.g.*, Fed. R. Civ. P. 53(e)(2)), the chances that the judge will reverse the master's findings are increased and double jeopardy principles more seriously offended. The appellants contend that the judge is required to make an independent determination, see *supra*, at 58, and the decision in *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974), while not explicit on the point, would seem to stand for that proposition. In California, where the laws providing for the use of juvenile court masters closely parallel those in Maryland, see *supra*, at fn.129, a recent appellate decision held that a juvenile court judge is required to exercise his independent judgment in reviewing a master's finding. *In re Randy R.*, 67 Cal. App. 3d 41, 136 Cal. Rptr. 419 (1977).

Whether this changed result can be attributed to the fact that the case appeared stronger without live witnesses or to the fact that the judge simply interpreted the evidence differently might never be known. The effect, however, is the same: the State has increased its chances of eventually winning by giving another judicial officer a chance to assess guilt "in the hope that [he] would come to a different conclusion." *Hoag v. New Jersey*, 356 U.S. 464, 474-75 (1958) (Warren, C.J., dissenting).[217]

This Court has long recognized that double jeopardy protections cannot be circumvented simply by conducting the second hearing on the record. This precise situation was before the Court in *Kepner v. United States*, 195 U.S. 100 (1904). Kepner was tried in the court of first instance without a jury and was acquitted. Pursuant to military rules then governing the Phillipine Islands,[218] the United States appealed the conviction to the Supreme Court of the Phillipine Islands[219] where Kepner was tried again on the merits and found guilty.

Due to the influence of Spanish law,[220] the review in the Supreme Court of the Phillipines was by retrial upon the

[217]*Hoag* was overruled in *Ashe v. Swenson*, 397 U.S. 436 (1970).

[218]*See* General Orders, No. 58, issued by the Office of the U.S. Military Governor in the Phillipine Islands on April 23, 1900. The full text of the orders is printed in the Penal Code Of The Phillipine Islands (1911).

[219]Appeal by the United States was authorized by General Orders, No. 58, §44.

[220]Under Spanish rule and until the promulgation of General Orders, No. 58, the lower court had no power to enter a final judgment in a criminal case until the Supreme Court of the Phillipines had reviewed it. *See United States v. Flemister*, 1 Phil. Rep. 317, 319 (1902). That practice was changed by General Orders, No. 58, §50, which eliminated automatic Supreme Court review in cases in which the

(continued)

record with the Supreme Court free to make independent determinations on both legal and factual matters. *See United States v. Gimenez*, 34 Phil. Rep. 74, 77 (1916). *See also United States v. Wilson*, 420 U.S. 332, 356 (1975) (Douglas, J., dissenting). This Court reversed Kepner's conviction because his double jeopardy rights were violated.[221] The fact that the second hearing was on the record in the Supreme Court of the Phillipines did not affect this Court's decision.[222]

Recently, this Court again examined the extent to which the Government may pursue a defendant at a second trial after losing at the first. In *United States v. Jenkins*, 420 U.S. 358 (1975), the trial court, after the close of evidence, filed findings of fact and conclusions of law, and ordered that Jenkins' indictment be dismissed. It was not clear whether the dismissal order was based exclusively on a legal interpretation or whether, in addition, the court was not satisfied that the Government had proved all of the elements of the offense.[223] Thus, a reversal on the ground

(footnote continued from preceding page)
penalty did not exceed one year's imprisonment or a fine of 250 pesos. Automatic review was further limited a year later by Act No. 194 of the Phillipine Commission, *Id.*

[221]Although Kepner's contention was based on an Act of Congress which extended double jeopardy rights to the Phillipines, this Court has since recognized that *Kepner* correctly stated Fifth Amendment double jeopardy principles. *See United States v. Wilson*, 420 U.S. 332, 346 n.15 (1975).

[222]An examination of General Orders, No. 58 reveals that the only mechanism for presenting evidence in addition to that already in the record when the case reached the Supreme Court of the Phillipines was for that court to remand the case to the court of original jurisdiction for the taking of evidence. *See* General Orders, No. 58, §42; *United States v. Gimenez*, 34 Phil. Rep. at 77-78 (1916).

[223]The trial court's opinion did not contain a general finding of guilt. *See* 420 U.S. at 367.

that the trial court had misconstrued the law would have required that the court do more than merely reinstate a guilty verdict.[224] The Government argued, however, that subsequent proceedings following reversal and remand "would merely be a 'continuation of the first trial.' " 420 U.S. at 368-69 (footnote omitted).

Pointing out that the Government's position rested upon an aspect of the "continuing jeopardy" concept that was articulated by Mr. Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195 U.S. at 134-37, but that has never been adopted by a majority of this Court, the Court ruled that

> it is enough for purposes of the Double Jeopardy Clause,...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. *Even if the District Court were to receive no additional evidence*, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause.... 420 U.S. at 370 (emphasis added).

[224]In *United States v. Wilson*, 420 U.S. 332 (1975), decided the same day as *Jenkins*, this Court concluded that an appeal by the Government was proper where a jury had returned a guilty verdict and the trial judge dismissed the indictment on a post-trial motion on the ground that the defendant had been prejudiced by a delay between the offense and the indictment. The Court reasoned that since a reversal on appeal would have required only a reinstatement of the jury verdict and not a second hearing, the double jeopardy clause was not offended. *See also United States v. Morrison*, 429 U.S. 1 (1976).

See also United States v. Martin Linen Supply Co., 430 U.S. 564, 570 (1977); *Finch v. United States*, 433 U.S. 676 (1977).

Although a juvenile court judge at the second hearing will not, under the revised rule, normally receive additional evidence, obviously he will have to make not merely supplemental findings, but rather findings that are directly contrary to those made by the master on the ultimate issue of innocence or guilt. Therefore, under the *Jenkins* test, the double jeopardy clause would be violated.

V. THE INTERESTS AND ENDS OF THE JUVENILE SYSTEM ARE PROMOTED BY EXTENDING THE DOUBLE JEOPARDY PROTECTION TO JUVENILES TO PROHIBIT RETRIAL BY A JUDGE FOLLOWING A FINDING OF NOT GUILTY BY A MASTER

In concluding that juveniles are entitled to the protections of the double jeopardy clause, this Court, in *Breed v. Jones*, 421 U.S. 519 (1975), analyzed the double jeopardy protection in light of the test articulated in the plurality opinion in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Of prime concern were the importance of the right and whether application of it would impair "the juvenile court's assumed ability to function in a unique manner." 421 U.S. at 533 (citations omitted) (quoting *McKeiver*). Once the fundamental nature of the right was expressly recognized, it became important to analyze its potential impact on the juvenile court system to determine whether the interests of society or of juveniles would justify allowing an exception to the protection. 421 U.S. at 534-35.

During the course of this litigation, appellants have never asserted that elimination of the State's ability to except to a master's findings would, in any fashion, foster inflexibility, eliminate informality, or increase the clamor and adversariness of a juvenile proceeding. Indeed, they have advanced no interest, either of society, of the juvenile, or of the juvenile court system that would be promoted by allowing this exception to the principle that no individual shall be tried more than once for a single offense.[225]

To the contrary, the application of double jeopardy principles to the instant case would not be inimical to the system of juvenile justice and the operation of the juvenile courts. Indeed, it would further those very aims that prompted the development of this unique system.

First, elimination of the State's right to except would actually diminish clamor within the system by contributing to finality of decision-making. When a youth is found not

---

[225]On p. 24 of their Brief, appellants parrot the language from *Breed* that indicates that there might be circumstances which could justify exceptions to the double jeopardy protection. They do so, however, not to suggest that there are unique advantages to the practice that is currently being challenged that would justify it as an exception to the protection, but rather to advance the erroneous notion that this Court, in *Breed*, did not reject the concept of "continuing jeopardy" as originally articulated by Mr. Justice Holmes in *Kepner v. United States*, 195 U.S. 100 (1904). Appellants state that this Court merely declined to apply that concept in *Breed* but "seemed" to leave the matter open for further consideration in another case where special interests would justify acceptance of it. Not only have appellants overlooked this Court's re-affirmance that the Holmes view has never been adopted by a majority of the Court, 421 U.S. at 534, but they have also improperly construed this Court's position, that exceptions to the double jeopardy protection under proper circumstances may be justifiable, to mean that the Holmes theory of "continuing jeopardy" may be accepted under certain circumstances.

guilty by a master, court involvement with that youth would end, and the adversary process would be terminated.

Second, elimination of the State's right to except may further promote the goals of the juvenile court system in that a youth involved with the process will more likely perceive the system as a fair one. As was discussed earlier,[226] both children and their parents normally view the master as the judge. They assume that he has the power to determine guilt or innocence and, if that determination is one of guilt, to order an appropriate disposition. When a child, found innocent by a master, is later ordered to report to court for another hearing on the same matter before a judge, he is likely to be confused and upset. Suddenly, a matter that he has reason to believe was settled is again the subject of court action. It is likely that a youth subjected to such a situation would believe that he has been treated unfairly. As this Court has stated, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). It has also recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " 349 U.S. at 136 (citations omitted). More recently, in *In re Gault*, 387 U.S. 1, 26 (1967), this Court acknowledged that recent studies suggest that "the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."

This concept, the importance of which has long been recognized where adults are concerned, is even more

[226]See *supra*, at 68-69.

important in those instances when children are involved. While few representations are made to adults that the criminal justice system purports to do anything but punish anti-social behavior, that is not the case in the juvenile system. We have not yet discarded the promise that we hold out to juveniles of rehabilitation and treatment. *See McKeiver v. Pennsylvania*, 403 U.S. at 550-51. That promise, however, is undercut when the State deliberately creates a procedure which, on its face, must appear unfair to the child subjected to it. He may find it difficult to believe that the State's primary purpose is to assist him in coping with problems when he feels that he is being persecuted by a prosecutor whose main interest appears to be obtaining a conviction. Should conviction then result, the youth may, as the result of a belief that he has been treated unfairly, resist all treatment efforts offered him. *See In re Gault*, 387 U.S. at 26-27; Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. TOL. L. REV. 1, 19 (1974); Whitebread and Batey, *Juvenile Double Jeopardy*, 63 GEO. L.J. 857, 862 (1975). Such a result would clearly be counter-productive and in derogation of the purpose of the juvenile system.

Appellants, in essence, argue that a youth, because of age and inexperience, may be subjected to a procedure that would be intolerable in the adult system. The only reason they have ever advanced in support of this position is that if the master system is struck down by a federal court, the case load would be too burdensome for the sole juvenile court judge sitting in Baltimore City.[227] Such an assertion is

[227]See the opinion of the court below, 436 F. Supp. at 1369. Appellants made such a claim in a "Post Trial Memorandum" filed in the companion habeas corpus cases on June 3, 1975. See Vol. I, pleading no. 18, of the original record in this Court, at 2-3. In their Brief in this Court, the claim is not repeated.

irrelevant since the viability of the use of masters is not in question in this case. The only issue before this Court is whether the Maryland procedure by which the State may except to a master's finding of innocence is unconstitutional.

However, even if an affirmance by this Court would encourage the demise of the master system, that possibility would not justify perpetuating a practice that denies children their constitutional rights, especially when there is no compelling reason for retaining that system. Indeed, abolishing the master system in Maryland is high on the priority list of those organizations that have been given the responsibility for recommending improvements in the operation of the state's juvenile courts.[228] The REPORT OF THE COMMITTEE ON JUVENILE AND FAMILY LAW AND PROCEDURE TO THE JUDICIAL CONFERENCE (1976)[229] has recommended

> that the "Juvenile Master System" as now practiced be abolished and that all juvenile cases be handled by judges specially assigned to juvenile court, subject to a very limited use of masters in the juvenile court. *Id.* at 1.

In support of this recommendation the Report states:

> No longer can we, the Judiciary, tolerate the treatment of juvenile justice as the "step child" of the courts. The problems of juvenile justice have too great an impact on the quality of life in the state and future criminal

[228]See the discussion in the opinion of the court below, 436 F. Supp. at 1369.

[229]The Report is included in the record as Defendant's Exhibit 3.

> behavior in general to be shunned and ignored as something beneath the dignity of a judge.
>
> The goal of any court system is to provide justice in individual cases. In addition, in light of the volume of work facing the court system and proliferating caseloads, a justifiable goal is the provision of justice in an efficient manner. The "juvenile master system" raises serious questions with regard to both these goals. *Id.* at 1-2.

A similar conclusion was reached by the Commission on Juvenile Justice:

> THE MASTER SYSTEM, AS PRESENTLY AUTHORIZED UNDER THE JUVENILE CODE, AND AS USED IN SOME OF THE COURTS THROUGHOUT THE STATE, SHOULD BE ABOLISHED. FINAL REPORT OF THE COMMISSION ON JUVENILE JUSTICE TO THE GOVERNOR AND GENERAL ASSEMBLY OF MARYLAND (Jan. 1, 1977) at 13 (capitalization in original).

In support of this recommendation, the Commission stated:

> The Juvenile Masters System has been widely criticized on national and local levels. Most recently the Judicial Conference of Maryland called for its abolition in juvenile causes. The Maryland State and American Bar Associations, and the National Advisory Commission on Criminal Justice Standards and Goals, to name only a few organizations, have also urged an end to this practice.
>
> More than any other factor, the use of masters in the juvenile courts is seen by the Commission as a major problem in the present system, according a lower level

of justice and consideration to children in the State, and lessening the court's credibility and image.

The Masters System not only evidences a "second class" status for juvenile causes, but is extremely inefficient, causing delays and duplication of work. The Commission acknowledges that there are many fine masters who would make good judges, but the problem is that they are *not* judges. *Id.* at 12.[230]

As the Commission noted, criticism of the master system is not confined to Maryland. Standard 8.3 of the NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION, REPORT OF THE TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976) advocates that all juvenile proceedings, including detention, waiver, adjudication, and disposition be heard only by a judge. *Id.* at 282. Likewise, the INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION (Tent. draft 1977) supports this position. *Id.* at 21.[231]

---

[230]The Report further noted that a second hearing before the judge, following an exception by a party to the master's ruling often results in an

> unnecessary duplication, wasting the time and money that the use of masters was intended to save, and raising the question of double jeopardy for the juvenile involved. *Id.* at 13.

[231]For a further discussion of the position of various standard setting organizations on the use of masters, see Amicus Curiae Brief of the National Juvenile Law Center, filed in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment of the district court be affirmed.

Peter S. Smith*

Adrienne E. Volenik
Maryland Juvenile Law Clinic
500 West Baltimore Street
Baltimore, Maryland 21201

Attorneys for Appellees

Of Counsel:

Michael S. Elder
Phillip G. Dantes
Karen L. Gilbert
Bruce A. Gilmore
Victoria A. Salner
Judith J. Shur
Gail R. Smith
Forrest R. Foss
Janet D. Webb
Evelyn A. Darden
Howard Margulies
Henry R. Abrams

*Court-appointed Attorney

February, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,
Appellants,

v.

DONALD BRADY, et al.,
Appellees.

Appeal from a United States District Court of
Three Judges for the District of Maryland

AMICUS CURIAE BRIEF

DAVID C. HOWARD
PATRICIA CONNELL
National Juvenile Law Center
3701 Lindell Boulevard
St. Louis, Missouri 63108
314 533-8868
Counsel for Amicus Curiae

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Table of Authorities

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, et al.,
Appellants,

v.

DONALD BRADY, et al.,
Appellees.

Appeal from a United States District Court of
Three Judges for the District of Maryland

AMICUS CURIAE BRIEF

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Juvenile Law Center is a national legal services support center, funded by contract with the Legal Services Corporation. The function of the Center is to provide assistance to clients eligible under the guidelines established by the Legal Services Corporation Act of 1974 in the area of juvenile and family law. The attorneys employed by the Center also act from time to time as *amicus curiae* in cases involving issues of substantial public interest and importance which affect the rights of indigent children and their parents.

Attorneys from the Center have studied the model juvenile codes and have reviewed the various statutory provisions which create the position of juvenile master in many jurisdictions. Further, *amicus* is familiar with the law and practice out of which the current litigation arose, and is vitally interested in the equitable resolution of the issues before this Court.

The filing of this brief reflects the concern of *amicus* that children in Baltimore are being deprived of a fundamental constitutional right, the right to be free from being twice placed in jeopardy because of the use of juvenile court masters.

Amicus has requested and obtained the written consent of all parties to file this brief.

SUMMARY OF THE ARGUMENT

Appellees in this action challenge, as a violation of their fifth amendment double jeopardy protections, the provisions of MD. RULES OF PROC. 911(c) (1977),[1] allowing the State in delinquency cases to take exception to a master's finding of innocence and seek a rehearing before the juvenile court judge.[2]

---

[1] While the initial rule challenged was Maryland Rule 908(e) it has been subsequently amended effective July 1, 1975, as Maryland Rule 910(e) and again effective January 1, 1977, as Maryland Rule 911(c).

[2] Although *amicus* realizes that Appellees attack both the provisions of Maryland Rule 911(c) and MD. CTS. & JUD. PROC. CODE ANN. §3-813(c) (Supp. 1977), in this brief we shall only refer to the Rule's provisions. *Amicus* accepts Appellees' belief that the double jeopardy protections are violated through the application of either statute or rule insofar as the state is permitted exception to the findings of the master, and that consequently this Court should rule on both provisions. *See*, Appellees Brief at Arguments III and IV.

Amicus will argue in this brief that the weight of scholarly thinking as expressed in model acts and national standards has recognized the double jeopardy difficulties inherent in this situation, and expressly provided mechanisms to avoid the instant predicament. Likewise the vast majority of states have similarly immunized themselves from suit by restricting or eliminating the role of masters or by adopting measures similar to those proposed in the model acts.

The State of Maryland has available to it a variety of ways in which to bring its use of masters into line with constitutionally acceptable standards; the present statutory scheme should not be upheld.

INTRODUCTION

Since the time this Court began to apply the due process protections generally afforded adults to the juvenile court system, it has struggled with a number of factors in each case. In *In re Gault*, 387 U.S. 1 (1967), the Court was particularly concerned with four factors: the underlying basis of the right; the effect the right would have on the beneficial aspects of the juvenile court system; recommendations of various studies and model acts dealing with the juvenile court system; and the extent to which the right was already applicable to delinquency proceedings in the various states. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 275 (1972).

The next time the Court decided a juvenile delinquency case, *In re Winship*, 397 U.S. 358 (1970), it chose to focus on the first two factors considered in *Gault*: the basis of the right; and the effect such standard would have on present juvenile court practice. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971),

this Court once again broadened its inquiry by contemplating the effect of the right on the fact finding process.

In each case, after analyzing the claim as it affected the individual litigant, the Court would proceed to assess the impact a decision might have on the juvenile justice system across the country by looking to other jurisdiction's procedures, and the extant model provisions and standards. *Kent v. United States*, 383 U.S. 558, 55n. 19 (1966); *In re Gault*, 387 U.S. at 37-41 and nn. 62 and 63, 48-49, 56-57 and nn. 98-99, 58n. 102; *In re Winship*, 397 U.S. at 360n. 3; *McKeiver v. Pennsylvania*, 403 U.S. at 548-550 and nn. 7-9; and *Breed v. Jones*, 421 U.S. 519, 538 and n. 19 (1975).

Whether the analysis is characterized as a survey of current practices or a weighing of the burdens a rule might impose, it remains clear that a survey of the model acts and standards proposed for the juvenile justice system, as well as the present problem as it exists under current statutes, can aid this Court in reaching its decision. For these reasons *amicus* will focus on the present referee[3] system with its attendant double jeopardy difficulties both as it is effectuated throughout the states and as it is approached by the commentators.

---

[3] The terms "referee", "commissioner" and "master" will be used throughout this brief interchangeably. Where differences in functions exist they will be explicitly noted.

ARGUMENT

I. The Model Acts Provide Protections That Obviate the Double Jeopardy Claim Presented by This Case.

Four major pieces of model legislation exist in the area of juvenile law: the STANDARD JUVENILE COURT ACT, prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the Children's Bureau, 6th edition (1959), hereinafter referred to as the STANDARD ACT; the UNIFORM JUVENILE COURT ACT, drafted by the National Conference of Commissioners on Uniform State Laws (1968), hereinafter referred to as the UNIFORM ACT; MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS, prepared by William H. Sheridan and Herbert Beaser, Office of Youth Development of the Department of Health, Education, and Welfare (1975), hereinafter referred to as the MODEL ACT; and the MODEL JUVENILE COURT ACT, drafted by Paul Piersma, Jeanette Ganousis and Prudence Willett Kramer, which is found in *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, at 20 ST. LOUIS U.L.J. 1 (1975), hereinafter referred to as the JUVENILE ACT.

These publications reflect an immense amount of time spent by experts in the social and legal professions in considering important questions dealing with the purposes and operations of juvenile courts. They embody the efforts of those experts to keep abreast of new developments in the juvenile area and to make practical suggestions to legislators on how to incorporate these developments into their juvenile codes. They also suggest practices and procedures to deal effectively with recurrent problems in the juvenile area, while protecting rights which are fundamental to children as well as to adults.

The fifth amendment guarantee against being placed twice in jeopardy is one such fundamental right. This Court has recognized that right as applicable to juveniles in *Breed v. Jones*, 421 U.S. 519 (1975).

Just as Maryland in Rule 911, recognizes the use of masters to hear certain cases, so too do all of the model juvenile acts. In Maryland the court may assign a juvenile case to a master for consideration. Following a hearing before him either party to the proceeding may take exception to his decision and ask for a [redacted] hearing before the juvenile court judge.

It is the practice of allowing the State's attorney to except to a master's finding and consequently force a second hearing that is herein challenged as violative of the double jeopardy clause of the fifth amendment.

A cursory glance at the model provisions mentioned above might lead to the conclusion that the Maryland practice is, at a minimum, in compliance with those publications and thus in line with suggested practices that have been drafted by those with the greatest expertise and awareness of possible collateral consequences.

All of the model acts that permit masters to conduct adjudicatory hearings provide that each party should be notified of the master's decision and of the right to a rehearing before the judge.

The STANDARD ACT states that:

> [W]ritten notice of the referee's findings and recommendations shall be given to the parent, guardian, or custodian of any child whose case has been heard by a referee, and to any other parties in interest. A hearing by the judge shall be allowed if any of them files with the court a request for review, provided that the request is filed within three days after the referee's written notice.

Section 7 at 22.

According to the UNIFORM ACT, which on this point is essentially identical to the MODEL ACT:

> [P]rompt written notice and copies of the findings and recommendations shall be given to the parties to the proceeding. The written notice also shall inform them of the right to a rehearing before the judge.
>
> (d) A rehearing may be ordered by the judge at any time and shall be ordered if a party files written request therefor within 3 days after receiving the notice required in subsection (c).

Section 7 at 11.

A more thorough reading of each of the model publications reveals, however, that the draftsmen included language that would not only distinguish each from the Maryland rule but would also prevent a double jeopardy problem from arising.

THE STANDARD JUVENILE COURT ACT

According to section 7 of the STANDARD ACT,[4] a referee may be appointed to hear "any case, or all cases of a class or within a district" designated by the judge and he is authorized to hear those cases in the first instance in a manner consistent with the other provisions of the act. However, "any party may, upon request, have a hearing before the judge in the first instance."

---

[4] *See*, Appendix A for the full text of Section 7 of the STANDARD JUVENILE COURT ACT.

The import of this statement is obvious. When a child chooses to have his case heard by the judge in the first instance, the double jeopardy problem raised by Rule 911 cannot occur.

The provision in section 7 that affords the right to a hearing before a judge rather than a referee is somewhat circuitous, in that there may be an initial scheduling before the judge. The importance of the right is emphasized in the comments to this section, which state that "[t]he right of a hearing before the judge, when demanded, must be respected." Obviously the drafters of the provision saw this right as absolute when exercised, yet, by allowing the judge initially to set the case before the referee, they viewed it as one that could be waived.

Proper waiver necessarily entails a finding that the decision to give up a right be made intelligently. *See, Johnson v. Zerbst,* 304 U.S. 458 at 464 (1938). Section 7 conspicuously lacks any provision to insure that this will be done. It does not, for example, state that the referee shall inform the child that he may have his case heard by the judge if he wishes or that after the hearing before a referee there may be a *de novo* hearing before the judge on the same charges. *Johnson* also involved another concern over the question of the validity of waiver: whether the official who accepts the decision to waive has ascertained that the choice was made intelligently, regarding not only the circumstances of the case but also the person's background and experience. *Johnson v. Zerbst* at 464. Obviously a provision that the master serve this function would be an asset to this section; however, the failure of the draftsmen to go into more detail here is understandable in light of two considerations.

First, although unstated in section 7, it is evident from reading the comments that the draftsmen of the Standard Act viewed the referee as an adjunct to the juvenile judge, with the responsibility for handling less serious cases.[5] The comments include suggestions concerning cases to be reserved to the judge and all are illustrations of potentially serious or difficult cases.[6] Clearly the draftsmen envisioned the judge as automatically reserving to himself any case in which a hearing before a referee could create special problems for the child.

Second, the STANDARD ACT includes, in section 19, the requirement that the court inform the child and his parents, guardian or custodian that they have a right to counsel at every stage of the proceeding and that the court will appoint counsel if they are financially unable to provide their own.[7] With counsel present to assist a child, he will not fail to ask for a hearing before the judge when to do so would be in his best interests. While waiver of a right, without assistance of counsel, may be suspect, where counsel is present, the presumption is that any waiver is made knowingly and on good advice. *See, e.g., R.L.R. v. State,* 487 P.2d 27 (Alas. 1971) where the court, concerned with the validity of a waiver of jury trial, stated that a child acting without legal counsel can make a few knowledgeable and

---

[5] The comments state that several committee members opposed the referee's section, "stressing the values of a good intake department in screening and preparing cases, and the need to have a sufficient number of judges for all judicial hearings." This is indicative of a concern that the referee not assume the same function and duties as the juvenile court judge.

[6] The judge may direct that certain controversies be reserved to him, *e.g.,* cases in which a child is likely to be removed from the custody of his parents; cases in which the parties are likely to demand a hearing before the judge; delinquency cases involving death or serious violence; cases in which the parties are represented by attorneys, unless their consent to a hearing before the referee is given; cases in which questions of law are involved.

[7] The STANDARD ACT recogniezd a child's right to counsel eight years before the landmark decision *In re Gault,* 387 U.S. 1 (1967), held that this was a necessary element of due process in a delinquency proceeding where a child faced the possibility of institutionalization.

intelligent decisions about his rights. The draftsmen could properly assume that by assuring a child the assistance of counsel they were also assuring that all of his rights would be protected and that any waiver thereof would be made knowledgeably. Thus the waiver of the right to request a hearing before a judge in the first instance could be valid without additional safeguards.[8]

The crucial point is that the Standard Act recognizes a child's right to be heard before the juvenile judge in the first instance, and so remove himself from a position where he may have to undergo a second hearing. In essence, by waiving his right to elect a hearing before a judge a child consequently elects to waive any claim to a violation of the double jeopardy clause if the state takes exception to the findings of the master.

THE UNIFORM JUVENILE COURT ACT

As in the STANDARD ACT, section 7 of the UNIFORM ACT provides that the judge may direct that "hearings in any case or class of cases be conducted in the first instance by the referees in the manner provided by this Act."[9] It also states that "before commencing the hearings the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearings shall be conducted by the judge."

---

[8] Section 19 states that if the child is unrepresented, after final disposition he and his parent or guardian will be informed by the court of their right to appeal the decision. The comments state that it is "presumed" that when they are represented by counsel the court need not make this statement. Here quite clearly the inference is that the presence of counsel is sufficient to guard against the unintentional waiver of the right to appeal. In like manner counsel would guard against the unintentional waiver of the child's right to be heard by the juvenile judge.

[9] Appendix B contains the full text of Section 7 of the UNIFORM JUVENILE COURT ACT.

In language even more direct than that of the STANDARD ACT published nine years earlier, the UNIFORM ACT also requires that a juvenile be informed of his right to be heard by the judge but allows him to waive that right.

The UNIFORM ACT provides more protection for a child than does the STANDARD ACT. Not only is there a right to representation by counsel at all stages of the proceeding (section 26), but section 7 requires that the parties be told in advance that they are entitled to be heard by the judge.

In a state with a provision very similar to section 7 of the UNIFORM ACT,[10] a child alleged that a second hearing before a judge placed him twice in jeopardy. There a referee had recommended that the court dismiss the delinquency petition against the child and the state, in accordance with the statute, asked for a new hearing. The court concluded that there was no double jeopardy violation because the parties had agreed to a hearing before the referee and so impliedly also agreed to the statutory procedures outlined for those hearings including the right of the state to except to the referee's decision. *People v. J.A.M.*, 483 P.2d 362 (Colo. 1971).

Importantly, the comments to section 7 state a concern about the role of the referee that was merely implied in the STANDARD ACT:

---

[10] Like the UNIFORM ACT, COLO. REV. STAT. §19-1-110 (3) (1974), provides that a child has the right to be heard in the first instance by the juvenile judge and that he must be informed of that right. "Prior to any hearing, except those at which the child is advised of his rights and either admits or denies the allegations of the petition, the referee shall inform the parties that they have the right to a hearing before the juvenile judge in the first instance, that they may waive that right, but that, by waiving that right, they are bound by the findings and recommendations of the referee." Either party also has the right to a review of these findings and recommendations.

> They [referee] serve a purpose where a case load is greater than the judge can effectively handle, but not sufficiently great to warrant the appointment of an additional judge. In such situations, the use of referees is warranted to relieve the judge of these routine and simple matters which do not call for the qualifications of a judge.
>
> But referees should not be resorted to as a substitute for additional judges when these are needed.

In *Matter of Anderson*, 272 Md. 85, 321 A.2d 516 (1974), the Maryland Court of Appeals discussed at length the traditional role that a master in chancery has played in this country, comparing him to a magistrate and stressing that he is normally to perform ministerial tasks and that his actions are always subject to the supervision of the courts. This view in no way contradicts the statements in the Uniform Act but is instead buttressed by them.

It is the opinion of *amicus* that while Rule 911(c) on its face does not conflict with the concept of the master as supplemental to but not a substitute for the juvenile judge, the implementation of the Rule in Baltimore City is in direct contravention therewith.

Where there are seven juvenile masters and only one juvenile court judge, it must be obvious to the most casual observer that the juvenile court docket is such that additional judges are needed. While it is difficult to formulate precisely when the need arises and masters become judge-substitutes, it is easy to see that that point was reached in Baltimore long before the seventh master was appointed.

The practice in Baltimore is inconsistent with the concept of masters as adjuncts to and not substitute for juvenile judges.

MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS

Undoubtedly the most sophisticated of the referee provisions and the one that most clearly avoids the constitutional problems raised by Rule 911(c), while still permitting adjudications by referees, is section 4 of the MODEL ACT.[11] While it allows the judge to direct the referee to hear "any case or class of cases" in the first instance, only the judge may hear delinquency and neglect cases where: "(1) the allegations set forth in the neglect or delinquency petition are denied; (2) the hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or (3) a party objects to the hearing being held by a referee." Subsection (3) is very similar to the safeguard included in both the STANDARD and UNIFORM ACTS. But subsections (1) and (2) appear to be in line with suggestions in the comments to the UNIFORM ACT to the effect that a referee should handle only those simple routine matters that do not call for the qualifications of a judge. Obviously transfer is a "critically important" stage in juvenile proceedings in which "vitally important statutory rights of the juvenile" are determined. *Kent v. United States*, 383 U.S. 541, 556 (1966). Any determination in such an important area should be made by the juvenile court judge.

Contested cases, referred to in subsection (1), are also of grave importance. Whenever a child in a delinquency proceeding or an adult in a neglect proceeding contests the allegations in the petition, critically important rights are at stake and these should not be determined by anyone of lesser stature and expertise than a judge. In addition, the requirement that these hearings be conducted by the juvenile court judge in the first instance prevents the inevitable request for rehearing by one party or the

---

[11] *See*, Appendix C for the full text of Section 4 of the MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS.

other that would result if a referee heard the case. Obviouly one of the intended benefits of utilizing masters is the reduction of the judges' case loads.[12] That benefit is greatly reduced if hearings before master actually result in an increase in the number of hearings scheduled on the juvenile court docket. Efficiency as well as avoidance of the constitutional issue raised in this case are both served by requiring the judge to hear a contested case in the first instance.

The MODEL ACT provisions are particularly interesting because this is the only model legislation that explicitly recognizes that juveniles are entitled to the protection of the fifth amendment double jeopardy clause.[13] Thus, it is understandable that the section on referees is carefully written so as to prevent any double jeopardy violation.

MODEL JUVENILE COURT ACT

The JUVENILE ACT goes one step further in insuring that the use of referees does not present double jeopardy problems by prohibiting their use in adjudicatory or dispositional hearings. While not dispensing with the role of referee totally, the act limits their duties to preliminary matters:

(A) Appoint counsel for a child, parent or guardian under section 10;

---

[12] *See*, Comment to section 7 of the UNIFORM ACT, at 11.

[13] Section 27 states: "Criminal proceedings and other juvenile proceedings based upon the offenses alleged in the petition or an offense based upon the same conduct is barred where the court has begun taking evidence or where the court has accepted a child's plea of guilty to the petition."

While the current edition of the Model Act was published in 1975, this provision is identical to the one included in the 1969 edition indicating that the draftsmen recognized the right as one necessary for the protection of juveniles even before the Supreme Court held that the right applied to adults in state proceedings [*Benton v. Maryland*, 395 U.S. 784 (1969)] or to children in juvenile proceedings, [*Breed v. Jones*, 421 U.S. 519 (1975)].

(B) Order that a child be taken into custody under section 4;

(C) Conduct a preliminary inquiry under section 7;

(D) Conduct a preliminary hearing under section 6;

(E) Authorize a lineup or photograph under section 12;

(F) Authorize a summons by publication under section 9.

Section 3(1) at 89.

In defining the functions of the referee so narrowly the commentary to this act makes it explicit that the position was chosen specifically to avoid double jeopardy problems. Suggesting that the elimination of hearings at the state's request might be a possible solution the JUVENILE ACT's authors finally opt for the limited powers alternative. JUVENILE ACT at 11-12.

Each of the model acts in its own way provides the juvenile with protection from a violation of the double jeopardy protections of the fifth amendment. These safeguards, whether furnished in implicit or explicit recognition of the issue presented by this case, indicates the ample opportunity that has existed for the State of Maryland to modify its use of masters to eliminate the challenged procedure.

II. At a Minimum the Juvenile Standards Would Require the Protections Afforded Children in the Model Acts Thus Eliminating the Double Jeopardy Claim Presented by This Case.

Over the years a number of prestigious organizations have worked towards developing comprehensive standards for the juvenile justice system. Such efforts were redoubled immediately after this Court's landmark decision of *In re Gault*, and the passage of the federal Juvenile Justice and Delinquency

Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified in scattered sections of 5, 18, 42 U.S.C. (1974)) (amended 1976), resulting in the development of numerous current sets of standards. These publications reflect the efforts of experts to integrate the humanitarian philosophy that gave rise to the juvenile court system with the legal procedures necessary to protect rights which are fundamental to children as well as to adults.

One of the earliest attempts to set guidelines for the administration of the juvenile justice system was accomplished in STANDARDS FOR JUVENILE AND FAMILY COURTS, prepared by William Sheridan in cooperation with the National Council on Crime and Delinquency and the National Council of Juvenile Court Judges published in 1966 by the Children's Bureau of the Department of Health, Education and Welfare. Although written before the *Gault* decision, these standards attempt to strike a balance requiring a level of formality consistent with the juvenile court philosophy of providing individualized justice.

These standards considered the use of referees in juvenile courts and concluded that it may be a desirable feature in order to assure prompt hearings. They caution, however, that "hearings held before a referee should be clearly designated as such, and the child and his family be appraised of their right to a hearing before the judge." W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS at 77 (1966). This position was reaffirmed when the National Council of Juvenile Court Judges undertook a revision of their standards in light of the extension of formal due process protections to juveniles charged with delinquent acts. NATIONAL COUNCIL OF JUVENILE COURT JUDGES, EVALUATION STANDARDS (1974). Both of these sets of standards require that the child's right to demand a hearing before the judge be protected. As discussed in Section I of this brief, this provision would obviate the need for appeals in these situations.

The National Advisory Commission on Criminal Justice Standards and Goals, which grew out of the Law Enforcement Assistance Administration (LEAA) of the U. S. Department of Justice in 1971, took a different point of view when it appraised the use of subjudicial decision makers in juvenile and family courts. Without specifically addressing juvenile courts, it recommended that all judicial functions in the trial courts be performed by full time judges. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS at 166 (1973). This position was premised upon a belief that the inferior position of the referee or lack of equivalent training and background may result in a diminution of the quality of justice dispensed by these individuals.

In the spring of 1975, LEAA established a Task Force to develop specific standards for implementation of the general guidelines of the earlier Commission. This group addressed the issue of judicial/subjudicial officers by stating as its Standard 8.3: "All judicial proceedings relating to juveniles including but not limited to detention, shelter care, waiver, arraignment, adjudicatory and dispositional hearings should be heard only by a judge." TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION OF THE NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS & GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION, at 282 (1976).

This stance almost mirrored that adopted by the Institute for Judicial Administration/American Bar Association's Juvenile Justice Standards Project in the tentative draft of its volume on Court Organization and Administration in section 2.2 "Referees; judicial officers. Only judges should perform judicial case decision-making functions." IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION, at 21 (1977).

Both groups adopting the position calling in effect for the abolition of juvenile court referees noted that, although referees are indeed helpful in relieving overburdened juvenile court judges, they also symbolize the lowered status of the juvenile courts. Hoping to overcome this problem and the possibility of inferior quality referees, the standards opt for their elimination.

The IJA/ABA Standard also allude to the possibility that the use of referees may actually have an inverse impact on judicial economy in states in which the judge must review each recommendation. This may result in the referee functioning as the judge, consequently setting up a double jeopardy challenge similar to this case. IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, COURT ORGANIZATION AND ADMINISTRATION, at 23 (1977).

The various groups which have undertaken to establish model standards and practices for juvenile court operation are aware of both the problems existing in the courts and the practicalities affecting their functioning. Cognizant of the limited resources of most courts utilizing referees, it is nevertheless that they have become an unworthy method of replacing judges in juvenile courts. For this reason recent standards call for the elimination of their use; alternatively if we permit them to function in this manner their findings must be accorded the full weight of an adjudication with double jeopardy applied to it.

III. **In Many of the States Where Referees Are Used the Statutory Provisions and Practice Avoid the Double Jeopardy Claim Presented by This Case.**

Of the fifty-one jurisdictions surveyed[14] only thirty-four[15] presently have statutory provisions for the use of referees, masters or other subjudicial officers[16] in juvenile or family courts. These figures are subject to frequent change, as some states have recently acted to eliminate the use of referees,[17] while others have severely limited their use,[18] or through other methods have attempted to remove the distinctions between the referee and the judge.[19]

---

[14] Codes of all fifty states and the District of Columbia were considered.

[15] ALA. CODE tit. 13, §357 (1959); ARIZ. REV. STAT. §8-231 (Supp. 1977); ARK. STAT. ANN. §45-408 (1977); CAL. WELF. & INST. CODE § 247 (West. Supp. 1977); COLO. REV. STAT. §19-1-110 (1974); DEL. CODE tit. 10, §913 (1975); GA. CODE ANN. §24-A-701 (1976); IDAHO CODE §16-1843 (Supp. 1977); IND. CODE ANN. §33-12-2-17 (Burns Supp. 1977); IOWA CODE ANN. §231.3 (1977); KAN. STAT. ANN. §20-310a (Supp. 1977); KY. REV. STAT. ANN. §24A.100 (Baldwin Supp. 1977); LA. REV. STAT. ANN. §13:1580.1 (West 1968); MD. RULES OF PROC. 911 (1977); MICH. COMP. LAWS ANN. §712A.10 (1968); MINN. STAT. ANN. §260.031 (West 1971); MISS. CODE ANN. §43-21-29 (Supp. 1977); MO. REV. STAT. §211.023 (Supp. 1978); NEB. REV. STAT. §43-236.01 (1974); NEV. REV. STAT. §62.090 (1977); N.J. STAT. ANN. §2A:4-12 (West 1952); N.D. CENT. CODE §27-20-07 (1974); OHIO REV. CODE ANN. §2151.16 (1976); OKLA. STAT. ANN. tit. 10 §1126 (1977); OR. REV. STAT. §419.581 (1975); PA. STAT. ANN. tit. 11 §50-301 (Purdon Supp. 1977); R.I. GEN. LAWS §8-10-3 (Supp. 1976); S.C. CODE §15-1120 (1962); TENN. CODE ANN. §37-207 (1976); TEX. FAM CODE ANN. tit. 3, §54.10 (1976); UTAH CODE ANN. §78-3a-14 (1977); WASH. REV. CODE ANN. §13.04.030 (1962); W.VA. CODE §49-5A-1 (Supp. 1977); WYO STAT. §14-115.11 (1971).

[16] The names for these officers does vary among the states: Idaho denominates its officers as "magistrates"; Kansas uses the term "judges pro tem"; and South Carolina employs "Associate Judges."

[17] *E.g.*, VA. CODE §16.1-144 (1960) (repealed 1972); and HAW. REV. STAT. §571-7 (1959) (repealed 1973).

[18] In Kentucky the use of trial commissioners is limited to those counties in which there is no resident district judge, a provision which eliminates their use in all of the major metropolitan areas where they had been heavily utilized. KY. REV. STAT. ANN. §24A.-100 (Baldwin Supp. 1977).

[19] *Compare* KAN. STAT. ANN. §38-804 (1973 (repealed 1976) *with* KAN. STAT. ANN §20-310a (Supp. 1977). The current statute adds the requirement that the judge pro tem be an attorney, and removes the earlier per diem pay rate of twenty-five dollars.

The double jeopardy problems raised in the instant case will naturally occur only where referees conduct the full range of judicial hearings in delinquency cases including adjudications and dispositions. Significantly, five of the states included within the above thirty-four severely limit the type of hearings to be conducted by masters. In Rhode Island masters are only permitted to assist judges in matters pertaining to delinquent support payments.[20] Louisiana restricts its referees to the adjudication and disposition of traffic violations by children.[21] Kentucky, West Virginia and Wyoming permit detention hearings and other preliminary matters to be heard by referees, but specifically bar them from conducting hearings on the merits of the case.[22] Thus in none of these five states could the problems presented to the Court by this case have occurred.

As discussed in Section I of this brief, in those states in which the child is afforded the right to a hearing by a judge the difficulties presented by Maryland Rule 911(c) are likewise avoided. Six[23] of the earlier thirty-four states contain this protection.

---

[20] R. I. GEN. LAWS §8-10-3 (Supp. 1976).

[21] LA. REV. STAT. ANN. §13:1580.1 (West. 1968).

[22] West Virginia specifies that "[i]t shall be the duty of the referee to hold any detention hearing . . . Each referee shall also perform such other duties as are assigned to him by the court . . . Referees shall not be permitted to conduct hearings on the merits of any case." W.VA. CODE §49-5A-1 (Supp. 1977). Wyoming directs "[i]n the absence or incapacity of the judge, the detention or shelter care hearing shall be conducted by a district court commissioner . . . a commissioner may issue subpoenas or search warrants, order physical or medical examinations, authorize emergency medical, surgical or dental treatment . . . but a commissioner shall not make final orders of adjudication or disposition." WYO. STAT. §14-115.11 (1971). *See also, Kentucky Rules of the Supreme Court,* Rule 5.030 (b) (West. 1977), for the similar limitations on trial commissioners acting in juvenile cases.

[23] Colorado: COLO. REV. STAT. §19-110(3) (1974); Georgia: GA. CODE ANN. §24-A-701(b) (1976); Michigan: MICH. COMP. LAWS ANN. §712A.10 (1968); North Dakota: N.D.

Georgia's provision is typical of the right afforded the child: "Before commencing the hearing, the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party so requests, the hearing shall be conducted only by the judge." GA. CODE ANN. § 24A-701(b)(1976). Thus six additional states have protected themselves from the double jeopardy claim presented by this case.

At least four other states are immune from the instant attack, since they do not permit the state to take exception to the findings of the referee. Both Alabama and Minnesota only permit the child, parent, guardian or custodian to request a review before the judge,[24] while California and Missouri would also permit the judge to review the case *sua sponte*.[25] Therefore in these jurisdictions a state would be unable to seek review of a finding of non-delinquency by the referee.[26]

Finally, there are two other states, Arkansas and Kansas,[27] where the findings of the referee appear to be given the same

---

CENT. CODE §27-20-07 (1974); Pennsylvania: PA. STAT. ANN. tit. 11, §50-301 (Purdon Supp. 1977); and Texas: TEX. FAM. CODE ANN. tit. 3, §54.10 (1976).

[24] ALA. CODE tit. 13, §357 (1959); MINN. STAT. ANN. § 260.031 (West 1971). *See also,* DEL. CODE tit. 10, §913 (1975), which would permit a request for review to be made by a probation officer if no custodian, adult friend or attorney for the child was present at the hearing.

[25] CAL. WELF. & INST. CODE §247 (West Supp. 1977); MO. REV. STAT. §211.029 (Supp. 1978).

[26] *But see, Jesse W. v. San Mateo Superior Court,* No. SF-23580 S. Ct. Cal. (*cert. granted,* Dec. 26, 1976), a case currently pending before the California Supreme Court which argues that even this limited type of review is prohibited by the double jeopardy protections.

[27] ARK. STAT. ANN. §45-408 (1977); KAN. STAT. ANN. §20-310a (Supp. 1977).

effect as that of the juvenile court judge. In these jurisdictions no mention is made in the statute of any review or rehearing provisions before the juvenile judge. The Arkansas statute explicitly states that "[t]he decisions of the juvenile referee shall be binding upon the county judge, who shall sign any order or judgment delivered by the juvenile referee, and such order or judgment shall be a decision of the county judge."[28] Provisions found in the Kansas code are similar, explaining only that:

> Any judge pro tem appointed pursuant to this section shall have the full power and authority of a district judge with respect to any actions or proceedings before such judge pro tem except that any judge pro tem appointed pursuant to subsection (d) shall have only such power and authority as provided therein.[29]

Of the thirty-four jurisdictions which now utilize referees in juvenile court proceedings, at most seventeen may present the possibility of double jeopardy violations similar to those posed by Maryland Rule 911(c). Since it is often difficult to determine from the literal statutory scheme just how procedures are implemented, there may be other jurisdictions in which the state by practice is not permitted to ask for a rehearing of a referee's finding of innocence. Perhaps this may explain why there have been no similar reported challenges to this type of procedure from other jurisdictions.

While *amicus* realizes that to strike down this procedure in Maryland may influence practices across the country, given the relatively small number of states in which such abuses could occur and the fact that states are now retreating from the use of subjudicial decision makers, this Court should not hesitate to act.

---

[28] ARK. STAT. ANN. §45-440 (1977).

[29] KAN. STAT. ANN. §20-310a(c) (Supp. 1977).

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the judgment of the district court.

Respectfully submitted,

DAVID C. HOWARD
Attorney for *Amicus Curiae*
National Juvenile Law Center

CERTIFICATE OF SERVICE

I, David C. Howard, Counsel for *Amicus Curiae*, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, February 21, 1978, three copies of Brief of *Amicus Curiae* to Clarence W. Sharp, Assistant Attorney General for the State of Maryland, Counsel for Appellants William Swisher, et al., at 1 S. Calvert Street, Baltimore, Maryland 21202, and Peter Smith, Maryland Juvenile Law Clinic, Counsel for Appellees Donald Brady, et al., at 500 W. Baltimore Street, Baltimore, Maryland 21201. I further certify that all parties required to be served in this appeal have been served.

DAVID C. HOWARD
Counsel for *Amicus Curiae*

APPENDIX

APPENDIX A

Standard Juvenile Court Act

Section 7

The judge, or senior judge if there is more than one, may appoint suitable persons trained in the law, to act as referees, who shall hold office during the pleasure of the judge. The judge may direct that any case, or all cases of a class or within a district to be designated by him, shall be heard in the first instance by a referee in the manner provided for the hearing of cases by the court, but any party may, upon request, have a hearing before the judge in the first instance. At the conclusion of a hearing the referee shall transmit promptly to the judge all papers relating to the case, together with his findings and recommendations in writing.

Written notice of the referee's findings and recommendations shall be given to the parent, guardian, or custodian of any child whose case has been heard by a referee, and to any other parties in interest. A hearing by the judge shall be allowed if any of them files with the court a request for review, provided that the request is filed within three days after the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge. If a hearing before the judge is not requested or the right to the review is waived, the findings and recommendations of the referee, when confirmed by an order of the judge, shall become the decree of the court.

APPENDIX B

Uniform Juvenile Court Act

Section 7

(a) The judge may appoint one or more persons to serve at the pleasure of the judge as referees on a full or part-time basis. A referee shall be a member of the bar [and shall qualify under the civil service regulations of the County]. His compensation shall be fixed by the judge [with the approval of the [governing board of the County] and paid out of [. . . . .]].

(b) The judge may direct that hearings in any case or class of cases be conducted in the first instance by the referee in the manner provided by this Act. Before commencing the hearing the referee shall inform the parties who have appeared that they are entitled to have the matter heard by the judge. If a party objects the hearing shall be conducted by the judge.

(c) Upon the conclusion of a hearing before the referee he shall transmit written findings and recommendations for disposition to the judge. Prompt written notice and copies of the findings and recommendations shall be given to the parties to the proceeding. The written notice also shall inform them of the right to a rehearing before the judge.

(d) A rehearing may be ordered by the judge at any time and shall be ordered if a party files written request therefor within 3 days after receiving the notice required in subsection (c).

(e) Unless a rehearing is ordered the findings and recommendations become the findings and order of the court when confirmed in writing by the judge.

APPENDIX C

Model Acts for Family Courts and State-Local Children's Programs

Section 4

(a) The ( )[9] may appoint one or more persons to serve as referees on a full- or part-time basis. They shall be members in good standing of the bar of this State. Their compensation shall be fixed by the ( )[9] with the approval of the ( )[10] and paid out of the general revenue funds of the ( ).[11]

(b) Delinquency and neglect hearings shall be conducted only by a judge if:

(1) the allegations set forth in the neglect or delinquency petition are denied;

(2) the hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or

(3) a party objects to the hearing being held by a referee.

Otherwise, the ( )[9] may direct that hearings in any case or class of cases shall be conducted in the first instance by a referee in the manner provided for by this (act).

(c) Upon the conclusion of a hearing before a referee, he shall transmit his findings and recommendations for disposition in

---

[9] Insert title of chief judge of court of highest general trial jurisdiction.

[10] Insert appropriate budgetary authority.

[11] Insert appropriate source of funds.

writing to the judge. Prompt written notice of the findings and recommendations together with copies thereof shall be given to the parties to the proceeding. The written notice shall also inform them of the right to a rehearing before the judge.

(d) A rehearing may be ordered by the judge at any time and shall be ordered if any party files a written request therefor within 3 days after receipt of the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge.

(e) If a hearing before the judge is not requested or ordered, or the right thereto is waived, the findings and recommendation of the referee, when confirmed by an order of the judge, shall become the decree of the court.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-653

WILLIAM SWISHER, et al,
Appellants,

v.

DONALD BRADY, et al,
Appellees.

On Appeal From the United States
District Court For the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

PAUL HALVONIK,
State Public Defender of California

GARY S. GOODPASTER,
Chief Assistant State
Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-653

WILLIAM SWISHER, et al,
Appellants,

v.

DONALD BRADY, et al,
Appellees.

On Appeal From the United States
District Court For the District of Maryland

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

PAUL HALVONIK,
State Public Defender of California

GARY S. GOODPASTER,
Chief Assistant State
Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-653

WILLIAM SWISHER, et al,
Appellants,

vs.

DONALD BRADY, et al,
Appellees.

MOTION OF THE STATE PUBLIC DEFENDER OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The State Public Defender of the State of California hereby respectfully moves for leave to file the attached brief amicus curiae in this case in support of appellees. The consent of the attorney for the appellees has been obtained. The consent of the attorney for appellants was requested but refused.

The California State Public Defender is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants,

including minors whose cases are heard by Juvenile Courts.

The basic structure of the Juvenile Court law of California resembles that of Maryland in its use of subordinate judicial officers (referees) to try the bulk of juvenile cases, with comparable provisions existing for the independent final determination of such matters by a duly authorized judge. As in Maryland, such final determination may be either by means of a trial de novo or by reading of the record of proceedings before the referee.

It is the desire of Amicus Curiae to alert the Court to the significance of a constitutional issue which looms strongly in the background of the instant case; namely, whether it is consistent with due process for an independent trial-level determination of criminal guilt to be accomplished through a procedure whereby a case is tried before a judicial officer who does not have authority to decide it, and then decided by another judicial officer who did not hear it.

This issue is placed in the immediate background of the double jeopardy controversy

by virtue of the assertion of both appellants and the Maryland Court of Appeals that Maryland juvenile cases are not, in fact, decided by the masters who hear them, but by judges who review a mere record of the master's proceedings.

Although the theoretical possibility of this type of factfinding exists under both Maryland and California law, its practical significance to the administration of juvenile justice has been made the greater in California by a series of California Supreme Court decisions beginning in 1975 (In re Edgar M. (1975) 14 Cal.3d 727; 122 Cal. Rptr. 574, 537 P.2d 406) which have approved of and encouraged the practice.

Since the practice of trial-by-transcript has, evidently, been less widespread in Maryland than in California, it's constitutionality has not been focused upon in the briefs of either appellants or appellees However, it is not difficult to envision the possibility that the Court might write an opinion herein which could, perhaps unwittingly, decide the double jeopardy issues raised by the parties in such a way as to cause the dubious practice of trial-

by-transcript to become even more entrenched in California than it is now, as well as causing the practice to spread to other states.

For this reason, and due to the great impact a decision of this case will have upon the many juveniles for whom amicus is counsel in the California courts,[1] we seek the Court's permission to file the attached brief.

Respectfully submitted,

PAUL HALVONIK,
State Public Defender

GARY S. GOODPASTER,
Chief Assistant
State Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

---

(1) The Supreme Court of California presently has under submission the case of Jesse W. v. Superior Court (Ct. App. 1976) 133 Cal. Rptr. 870, Hrg. gtd. December 29, 1976, SF # 23480, the issues which are substantially identical to those here, and which will be controlled by this Court's disposition of the instant case.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-653

WILLIAM SWISHER, et al,
Appellants,

v.

DONALD BRADY, et al,
Appellees.

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

PAUL HALVONIK,
State Public Defender of California

GARY S. GOODPASTER,
Chief Assistant State
Public Defender

LAURANCE S. SMITH,
Deputy State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone: (916) 322-5298

Attorneys for Amicus Curiae

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

I

DUE PROCESS REQUIRES THAT STATES GIVE THE POWER TO DECIDE CASES TO THE SAME CLASS OF JUDICIAL OFFICERS IT EMPOWERS TO HEAR THEM

Appellant State of Maryland has taken the position that the juvenile appellees were not subjected to double jeopardy under a Maryland procedure whereby they were tried before a subordinate judicial officer known as a master; and, when exonerated of the charges by the master, subjected to a second consideration of the evidence by a duly authorized judge, either upon consideration of the record or upon a "live" retrial. (Md. Ann. Code, Cts & Jud. Proc. Art § 3-813(c).)[1a]

Section 3-813(c) is limited in its operation by rule 910e, Maryland Rules of Court. This rule provides that when the State takes exception to the master's findings, the judge must determine the matter for himself on the basis of the record, supplemented by such additional evidence as is

---

1a. Rule 910a, Maryland Rules of Court, provides for the recording of proceedings before a master by either stenographic or electronic means. According to evidence

not objected to by the parties. The procedure involved is thus strikingly similar to that condemned in this Court's seminal decision in Kepner v. United States (1904) 195 U.S. 100, wherein the Phillipine Supreme Court's substitution of a judgment of conviction for the trial court's finding of innocence on the basis of their review of the trial record was held to constitute double jeopardy.

The question of whether such readjudication by a judge constitutes double jeopardy has, however, been ably and thoroughly argued by appellee's counsel. For that reason, this brief will instead concentrate solely upon a point which, though closely and inescapably bound together in with the jeopardy issue, has not been made the focus of argument either in this Court or below.

That point is whether a trier of fact's independent determination of criminal guilt by means of the mere consideration of the cold record of proceedings held before a subordinate officer, without himself hearing and seeing the witnesses present their testimony, is a process which is sufficiently reliable to be considered the due of an individual accused of a serious crime.

This issue is placed in the immediate background of the double jeopardy controversy by virtue of the assertions of both the appellants and the Maryland Court of Appeals that Maryland juvenile cases are not, in fact, decided by the masters who hear them, but by judges who review a mere record of the master's proceedings.

/

/

/

/

/

/

/

/

---

in the instant record, the present custom in Baltimore County is for the proceedings to be tape recorded [see App. 44, 55]. California practice is for the judge to read a stenographic transcript when objection to referee findings originates with the minor (California Welf. & Inst. Code § 252); when it originates with the state, a referee's findings might be vacated solely on the basis of representations by the prosecuting attorney. (Donald L. v. Superior Court (1972) 7 Cal.3d 592, 598-599; 101 Cal. Rptr. 850, 498 P.2d 1098.)

For reasons we shall elaborate below, we think practice of "trial-by-transcript" cannot be depended upon to reach factually accurate results in any case wherein the evidence is in conflict. It thus does not measure up to the elemental requirements of fairness and reliability which are embodied in the concept of due process of law. (In re Winship (1970) 397 U.S. 358.)

/
/
/
/
/
/
/
/
/
/
/
/
/
/
/
/
/

A. The Nature Of The Trial-By-Transcript Problem In California: Subordinate Judicial Officers With Unlimited Powers To Hear Cases, But No Power To Decide Them

Like Maryland, California employs a species of subordinate judicial officer, known locally as a referee, to adjudicate the bulk of cases wherein juveniles are accused of criminal conduct. (Gough, Referees in California Juvenile Courts, A Study in Sub-judicial Adjudication (1967) 11 Hast. L.J. 3.) Like his Maryland counterpart, the California referee serves at the pleasure of the court which appoints him; if originally appointed prior to a certain date, he need not even be a lawyer. (California Welf. & Inst. Code § 553; Md. Ann. Code & Jud Proc. Art, § 3-813(a).) He is not subject to appointment by any public official who is directly responsible to the electorate; nor is his appointment subject to Legislative confirmation. He is not required to run for election himself, and is not subject to discipline by the state's commission on judicial performance. (See California Const. Art. VI, §§ 8,

18(a).)

Pursuant to Article VI, section 22 of the California Constitution, the referee is limited to the performance of "subordinate judicial duties". As a descendant of the special master in Chancery, his conclusions are advisory only; before they may constitute a judgment of the court, a duly authorized judge must adopt them as his own, exercising his own judgment, independent of that of the referee. (In re Edgar M. (1975) 14 Cal.3d 727, 734, 736; 122 Cal. Rptr. 574; 537 P.2d 406; cf. In re Anderson (Md. 1974) 321 A.2d 516, 525-527.) As this Court long ago noted, "It is not within the general province of a master to pass on all the issues in an equity case. . . . [The Court] cannot . . . abdicate its duty to determine by its own judgment the controversy presented and devolve that duty on any of its officers." (Kimberly v. Arms (1889) 129 U.S. 512, 524.)

Notwithstanding these inherent limitations on the decision making powers of referees and masters, in juvenile cases both California and Maryland have radically expanded the hearing powers of their

subordinate judicial officers, so that they are now authorized to preside over entire trials of allegations of criminal wrongdoing by minors, in cases ranging from malicious mischief to premeditated murder. While so presiding, for example, the California referee is clothed with "the same powers as a judge". (California Welf. & Inst. Code § 248.)

Historically, subordinate judicial officers such as referees were limited to the performance of ministerial acts such as ex parte "chamber business" between terms of Court (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 361; 110 Cal. Rptr. 353; 515 P.2d 297; see Von Schmidt v. Widber (1893) 99 Cal 511, 512-513, 34 Pac 109); or to the performance of "services, mainly of a clerical character, in the progress of a case". (Ennesser v. Hudek (1897) 169 Ill. 494; 48 N.E. 673, 674; see Cal. Code Civ. Proc. § 639(1) (authorizing involuntary reference solely for the "examination of a long account); Cal. Gov't. Code § 72401 (defining the powers of a

/

/

traffic referee),[2] cf. 28 U.S.C. § 636(b) (defining powers of United States Magistrates)[3].)

It has been the lack of final decision making authority on the part of both California's referees and Maryland's masters which has led both states to advance a grotesque distortion of traditional double jeopardy doctrine in the form of an argument that even though the proceedings

---

(2) "(a) With respect to any misdemeanor violation of the Vehicle Code, he may fix the amount of bail, grant continuances, arraign the defendant, hear and recommend orders to be made on demurrers and motions other than for continuances, take pleas and set cases for hearing or trial.

. . .

"(b) With respect to any infraction, he may have the same jurisdiction and exercise the same powers and duties as a judge of the Court." [An infraction is not punishable by imprisonment. Cal. Pen. Code § 19c.)

(3) "(a) A judge may designate a magistrate to hear and determine any pre-trial matter, except a motion for injunctive relief. . . . A judge may reconsider any pre-trial matter . . . where it has been shown that the magistrate's ruling is clearly erroneous or contrary to law." (. . .)

before the referee are before an officer of a court which has jurisdiction over the case,[3a] and have, in reality, every feature associated with the plenary trial of a criminal case, the referee's lack of authority to decide such cases prevents jeopardy from attaching or terminating in connection with the proceedings. (In re Anderson, supra, 321 A.2d 516 at 523-524;[4] Jesse W. v. Superior Court (Ct. App. 1970) 133 Cal. Rptr. 870; In re Dale S. (1970) 10 Cal.App.3d 952, 955-956; 89 Cal. Rptr. 499; In re Bradley (1968) 258 Cal.App.2d 253, 258 65 Cal. Rptr. 570.)

As a predictable result of the disharmonious expansion of the hearing powers of subordinate judicial officers, specially

---

(3a) Blackstone, for example, defines a "court" as being, "any place where justice is judicially administered". (3 Blackstone, Commentaries §23.)

(4) Maryland in particular carries the argument ad absurdum by variously comparing a trial before a master to a preliminary hearing before a magistrate and a coroner's inquest. (In re Anderson, supra, 321 A.2d at 524-525.) Unlike such proceedings, a hearing before a referee or master purports to determine actual guilt -- not mere probable cause.

acute problems have arisen with respect to the manner in which Judges are to perform their function of determining the facts of a case, using judgment independent of that of his subordinate. Where before only the checking of an account [see Cal. Code Civ. Proc. § 639(1)] or review of a recommended ruling on a demurrer was required, the judge is now required to somehow pick between a welter of conflicting testimony which appears on the pages of a transcript and to decide whether the referee has correctly determined whether criminal guilt was established beyond a reasonable doubt.

We think such a decision making process to be impermissibly haphazard and unreliable; where the question involved is one of such fundamental importance to both individual and society as the determination of an accused individual's liberty, its unreliability places it in direct conflict with the Fourteenth Amendment's guarantee

/

/

/

/

/

/

of due process of law.(5)

California has gone perhaps the furthest of any state in expressly maintaining it to be acceptable for a judge to base his decision of the case upon his mere reading, in private, of a reporter's transcript of

/

/

/

/

/

/

/

/

/

/

---

(5) We note that at least where adults are involved, the California Legislature has taken great pains to insure that subordinate judicial officers do not adjudicate the merits of any civil or criminal matter where important interests are involved. (Burns v. Superior Court (1903) 140 Cal 1, 12-13; 73 Pac 597; see Washburn v. Washburn (1942) 49 Cal.App.2d 581, 589; 122 P.2d 96. (divorce case)) In California, the only context in which a subordinate officer may adjudicate a case is that of Vehicle Code infractions, which do not involve the possibility of incarceration. (California Pen. Code § 19c; see California Gov't Code § 72401, quoted in note 2, ante.)

the proceedings.[6]

"[California Welf. & Inst. Code] section [252] empowered the judge to deny the minor's application for rehearing only after reading the reporter's transcripts of the two proceedings on which the referee had based his findings and orders. . . . . Thus, a judge's decision to deny the [minor's] application for ["live"] rehearing and hence adopt the referee's determinations as those of the Court is based on data amply sufficient for forming a judgment independent from that of the referee. . . ." (In re Edgar M., supra, 14 Cal.3d at 727, 735-736; 122 Cal. Rptr. 574, 537; P.2d 406.)

Subsequent California appellate decisions have given even heavier emphasis to the notion that reading a transcript is a perfectly acceptable way to determine the facts in

---

(6) The California Court of Appeal's opinion in Jesse W. v. Superior Court, supra, 133 Cal. Rptr. 870 suggests that a judge may overturn a referee without even reading the transcript. See also Donald L. v. Superior Court, supra, 7 Cal.3d 593; 101 Cal. Rptr. 850; 498 P.2d 1098.

a contested criminal case. One Court has held that the "substantial evidence" standard which is commonly employed on appeal may not be (openly) employed by the judge; he must independently weigh the evidence de novo. (In re Randy R. (1977) 67 Cal.App. 3d 41; 139 Cal. Rptr. 419.)

Two other courts have carried forth in the "worst of both worlds"[7] double standard so commonly applied in juvenile matters by rejecting the teachings of four centuries of legal history by proclaiming, in effect, that the credibility of a witness can be made to emanate from the pages of a transcript. (In re Jay J. (1977) 66 Cal. App.3d 631, 633-634; 136 Cal. Rptr. 125; In re Gregory M. (1977) 68 Cal.App.3d 1085, 1093; 137 Cal. Rptr. 756 .[8]

---

(7) See Kent v. United States (1966) U.S. 541, 556.

(8) The latter two cases employ the intellectual technique of misconstruing the minor's objections to the practice of trial-by-transcript as being objections to the mere title of the referee. This intellectual technique contrasts starkly with that used to characterize referees in cases which turn back claims of double jeopardy following a finding of innocence. (see pp. 9-13, ante.)

B. Due Process and Equal Protection Both Demand That Where Liberty Is At Stake, The Most Reliable - Not The Most Mediocre - Factfinding Methods Be Employed

At this point, we wish to stress that it is not our purpose here to assert that the federal constitution bars states from creating a separate trial judiciary for juveniles, perhaps with different qualifications than those required of other judges, and designating their title as referees or masters. What we do argue is that the constitution does not permit a state to vest plenary decision making authority over criminal or quasi-criminal cases in one class of judicial officer, while requiring the accused to stand trial before another. If accused juveniles are to be made to stand trial before referees or masters, in other words, then the states must give such officers the power to decide the cases they hear.(9)

---

(9) A peripheral, but quite important consideration involved here is the need to preserve that uniquely informal quality

It is with this qualification in mind that we shall proceed to analyze and discuss the question of whether it is consistent with the Fourteenth Amendment's guarantee of due process of law for a case to be decided, on the trial level, by one who merely reads a transcript of evidence heard by another.

Liberty stands next only to life itself as the most precious of values. The degree of care and accuracy which must attach to factfinding in a proceeding affecting this interest must therefore be the highest of all. To begin, we recall the general

---

traditionally associated with the juvenile process which this court has stressed to be the chief reason for permitting maintenance of a separate system of juvenile courts. (see e.g., McKeiver v. Pennsylvania (1971) 403 U.S. 528, 545.) California's recent experience with trying to maintain a system of trial before subordinate judicial officers has led to the injection of such a degree of litigous formality into the juvenile process that an anti-trust case now almost seems simple by comparison. (See In re Lionel P., (1977) 20 Cal.3d 260; ___ Cal. Rptr. ___, ___; ___ P.2d ___; In re Teddy Y. (1977) 74 Cal. App.3d 455, ___ Cal. Rptr. ___.)

statement of this proposition which this Court made twenty years ago in Speiser v. Randall (1958) 357 U.S. 513, 520: "To experienced lawyers, it is commonplace that the outcome of a lawsuit . . . . depends more often upon how the factfinder appraises the facts than on a disputed construction of a statute . . . . Thus the procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule to be applied. And the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." (Emphasis added.)

Even before Speiser, moreover, the Court had expressly disapproved of the separation of the hearing and decision making functions in criminal cases: "One of the essential elements of the determination of crucial facts is the weighing and appraising of the testimony . . . We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceedings, the equivalent of the judge's own exercise of the function of the

trier of facts". (Holiday v. Johnston (1941) 313 U.S. 342, 352.)

In 1971, the Court gave further elaboration to its insistence on the factual integrity of criminal cases in In re Winship (1970) 397 U.S. 358, where it was declared that a juvenile accused of crime must be proven guilty beyond a reasonable doubt.

"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both becuase of the possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized. . . .

"There is always in litigation a margin of error . . . where one party has at stake an interest of transcending value . . . this margin or error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder . . . beyond a reasonable doubt .

"Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the commu-

nity. . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . ." (In re Winship, supra at 364-365.)

The years following Winship have seen the Court take several other opportunities to declare in ever stronger terms that there is little, if anything to distinguish the trial of a juvenile from that of an adult. (Breed v. Jones (1975) 421 U.S. 519; see Gagnon v. Scarpelli (1973) 411 U.S. 778, n.12 at 790.)[10] The California Supreme Court has as well recognized that in the factually contested case, it is appropriate to conduct the proceedings in as formal and careful a manner as would apply in a criminal case. (People v. Superior Court (Carl W.) (1975) 15 Cal.3d 271, 279; 124 Cal.Rptr. 47, 539 P.2d 807.)

/

/

10. See Supreme Court Review (1975): Juvenile Law - Double Jeopardy (1975) 66 J. Cr. L & Crim. 408, 415.

It is of obviously equal importance that the method of proof, aside from the theoretical quantum of proof, not leave people in doubt whether the innocent are being condemned. As should now be clear, such doubts are magnified to intolerable levels where the method employed renders any quantum requirement largely meaningless through its inability to preserve that indispensable part of the evidence consisting of the "wordless language" imparted by the live witness.

C. As Demeanor Does Not Shine Through The Lines Of A Cold Reporter's Transcript, Trials By Transcript Can Never Be More Than Trials By Substantial Evidence

The most informative, accurate, and fair manner for a trier of fact to consider the testimony of a witness is for that trier to see and hear the testimony given before him. Because it is impossible to assess the demeanor of witnesses from a cold transcript, our law has recognized from its earliest beginnings that it is unreliable and distinctly second-rate for the testimony of witnesses to be presented by means of the mere reading of notes, depositions, or transcripts. From the very beginning of the times when cases have been tried by

hearing the testimony of witnesses to the present, it has uniformly been held that such methods are only to be employed as a last resort, as where the death or absence of the witness makes in unavoidably necessary to proceed in such a manner. (Statute 5 & 6 Edw. VI, c. 11, § 12 (1552); 1 Hale Pleas of the Crown 305 (1716); Statute, 11 & 12 Vict. C. 42 § 17 (1848); Cal. Ev. Code § 1291; Fed. Rules Evid. Rule 804(b)(1), 28 U.S.C.A.)

Over a century ago, Lord Coleridge summarized the view of the common law, saying: "The most careful note must often fail to convey the evidence fully in some of its most important elements - those for which the open oral examination of the witnesses in the presence of the prisoner, judge and jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration. . . . It is in short, the dead body of the evidence without its spirit; which is supplied, when given openly and orally, by the ear and eyes of those who receive it." (Regina v.

Bertrand (1867) 4 Moo. P.C. (N.S.) 460, 472; see also Fenwick's Trial (House of Commons, 1696) 13 How. St. Tr. 591, 638, 712: "Our law requires persons to appear and give their testimony 'viva voce', and we see that their testimony appears credible or not by their very countenances and the manner of their delivery. . . ."

The earliest reported decisions of American courts also recognized the obvious. In 1849, for example, a Georgia Court was faced with a matter in which the deposition of an available witness in a civil case had been read in evidence over objection. The court responded by saying, "When it is recollected that depositions are admitted only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the common law . . . and is therefore subject to the rule of law which forbids such evidence when better evidence exists . . . [T]he oral testimony of the witness, in the presence of the court and jury is much better evidence than his deposition can be." (Hammock v. McBride (1849) 6 Ga. 178, 183.)

Though the Civil War was soon to follow, the north and south were united on at least this point; for only a year before, the New York Court had disapproved the reading of a witness' deposition in a criminal case: "[The right of confrontation] means that [the accused] shall be confronted on the trial, so that the judge and jury may have the opportunity of observing the appearance and manner of the witness, as well as hearing what he has to say - the former sometimes proving a complete antidote to the latter, as is well known to every nisi prius lawyer." (Barron v. People (1848) 1 N.Y. 386, 391.)

Through the intervening century - mental telepathy not having been perfected - our courts have continued to find facts by listening to and weighing the testimony of witnesses. That there has been no change in the limitations on the written (as opposed to the spoken) word as a tool of communication during that period was well attested by the late Jerome Frank, writing for the Second Circuit with the concurrence of Justices Augustus and Learned Hand: ". . . [T]he demeanor of the

orally testifying witness is 'always assumed to be in evidence' (citation). It is 'wordless language'. The liar's story may seem uncontradicted by one who merely reads it, yet it may be contradicted in the trial court by his manner, his intonations, . . . and the like - all matters which cold print does not preserve', and which constitute 'lost evidence' as far as an upper court is concerned. . . . A stenographic transcript . . . is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2 Cir 1949) 175 F.2d 77, 80.)

Lest there be doubt that any last minute revelation of science has changed the nature of things for the jurisprudence of California in the 1970's, we aver to a contemporary California opinion on the subject, Meiner v. Ford Motor Co. (1971) 17 Cal.App. 3d 127, 140; 94 Cal. Rptr. 702: "The law has long recognized the problem of appellate review in the matter of credibility of witness based upon their demeanor. A written transcript of testimony is but a pallid

reflection of what goes on in court. . . ."

Finally, it is significant that in 1966 an Arizona appellate court, as yet unreconstructed by In re Gault [(1967) 387 U.S. 1], found itself compelled to disapprove the practice of resolving traffic cases on the basis of a reading of data presented to a referee. Such techniques, it was held, do not convey sufficient information to permit an informed, individualized decision. (Flynn v. Superior Court of Maricopa County (1966) 3 Ariz.App 354; 414 P.2d 438.)

Clearly, then, if there is one clear thread which can be drawn from the last four centuries of jurisprudential experience, it is that essential demeanor evidence is not conveyed by a written transcript. Since this is the case, it inescapably follows that a judge can not do more than determine whether substantial evidence supports his subordinate's conclusions, thus leading to trials conducted not according to the rule of reasonable doubt, but according to the substantial evidence rule.

For example, federal District Judges, re-

viewing the findings of referees in bankruptcy pursuant to 11 U.S.C. § 67(c) have been forthright in stating that they cannot, and therefore will not, second-guess findings of fact made by referees on conflicting evidence. (In re Rosenberg (2d Cir 1945) 145 F.2d 896, 898 (and authorities there cited); In re Katz (E.D.N.Y. 1938) 23 F.Supp. 429, 430; In re Zipco (S.D.Cal 1957, I.R. Kaufman, J.) 157 F.Supp. 675, 677: ". . . I must accept the referee's findings of fact unless clearly erroneous".

The Maryland Court in In re Anderson, supra, 321 A.2d at 516, also notes that the "clearly erroneous" standard is applicable to review of the findings of masters: "[T]he master's findings of fact from the evidence are prima facie correct and they will not be disturbed unless clearly erroneous."

In another context, one comparable to that here in that personal liberty is at stake, this Court condemned the practice of some federal trial judges of referring hearings on issues of fact which arose in habeas corpus cases to United States Magistrates. (Wingo v. Wedding (1974) 418 U.S.

461.)

Following the decision in Wingo, Congress reacted by amending 28 U.S.C. § 636(b) to provide for a right, in habeas corpus proceedings, to de novo determination by a judge when exceptions are taken to a magistrates determination of review of other, preliminary matters. (28 U.S.C. § 636(a).)

Clearly, there is no basis for a conclusion that judges of the superior court possess the ability to breathe life into dried peaches, dead bodies, or cold transcripts; it has been held often, for example, that such judges have no power to second-guess the judgment of a committing magistrate upon reading a reporter's transcript of a felony preliminary hearing. (People v. Hall (1971) 3 Cal.3d 992, 996; 92 Cal. Rptr. 304; 479 P.2d 664.) As we are informed by the Jay J. opinion, supra, 66 Cal.App.3d at 634, the qualifications of referees of the juvenile court are comparable to those of committing magistrates; it follows that superior judges have no greater powers to "independently" breathe demeanor evidence back into a reporter's

transcript produced by a referee than they have to breathe it into one produced by a magistrate. Perhaps the best proof of this proposition comes, however, from the fact that the justices of the California Supreme Court, who must consider themselves at least equal in ability to the judges of trial courts, deem themselves unable to perform such a feat with respect to the findings of special masters they appoint: "We are not bound by the findings of [our own] referee although they are entitled to great weight if supported on the record. (Citations)" (In re Hurlic (1977) 20 Cal.3d 317, 325 ___ Cal. Rptr. ___; ___P.2d ___.)

Trials-by-transcript can never be more than trials by substantial evidence. Such trials do not, therefore measure up to the minimum standards of factual accuracy necessary to constitute due process of law. But perhaps above all, bearing in mind that this case deals with juvenile justice, it should be said that such an impersonal practice is wholly devoid of the "concern", the "sympathy", and the "paternal attention" which have been held to justify the main-

tenance of a separate system of justice for the young. (McKeiver v. Pennsylvania, supra, 403 U.S. at 550.)

- - - - -

CONCLUSION

Had not the Legislatures and highest courts of at least two states attempted to provide for the trial-level resolution of criminal cases by judicial officers who have not personally heard the evidence, one would have thought it unnecessary to belabor the point that indispensable demeanor evidence does not shine through the pages of a transcript, and that when cases are decided by judges who only read transcripts, the result can be no more than trials by substantial evidence.

That such a development has taken place within the ostensibly benevolent forum of the juvenile courts brings to mind the truth of Brandies' famous dictum that "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent". (Olmstead v. United States (1928) 277 U.S. 438, 479 [dissenting opinion].) It reminds us as well of Erskine's observation, made during the trial of Thomas Paine, that arbitrary power has never been introduced into a country all at once; always it is

introduced in slow steps, lest the people see its approach. (The Trial of Thomas Paine (1792) 22 How. St. Tr. 358, 443.)

If that part of Md. Ann. Code, Jud. Proc. Art § 3-813(c) which permits trial-level resolution of a juvenile criminal case by a judge who only reads a record of evidence presented to a subordinate passes constitutional muster, then there would be little to prevent all criminal proceedings from being decided in such a manner.

We consider abhorrent the prospect of any criminal case being decided by someone who, at least to the parties and witnesses, seems but an incorporeal entity; sitting like the Wizard of Oz behind the closed doors of his chambers while issuing forth proclamations and judgments. It thus is our hope that nothing will emerge from the Court's opinion herein which could be read as giving further inception to such practices.

/

/

/

/

/

We urge, therefore, that this Court hold that the Fourteenth Amendment's guarantee of due process of law requires the states to give the power of decision to whatever class of judicial officer it empowers to hear the evidence; and that it be accordingly held that no part of section 3-183(c) is constitutional.

Respectfully submitted,

PAUL HALVONIK
State Public Defender
of California

GARY S. GOODPASTER
Chief Assistant
State Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,

Appellants,

v.

DONALD BRADY, ET AL.,

Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

ANSWER IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLEES

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.

The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

WILLIAM SWISHER, ET AL.,

Appellants,

v.

DONALD BRADY, ET AL.,

Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

ANSWER IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Now comes the Appellants William Swisher, et al., by their attorneys, Francis B. Burch, Attorney General of Maryland, George A. Nilson, Deputy Attorney General, Clarence W. Sharp, Assistant Attorney General, Chief, Criminal Division and Alexander L. Cummings, Assistant Attorney General, and pursuant to Rules 35, 39, 40 and 42 of the Supreme Court of the United States, oppose the Motion for Leave to File Brief *Amicus Curiae* in support of Appellees' filed by the State Public Defender of California in the above captioned case and for reason says:

1. The Public Defender for the State of California, who is seeking permission of this Honorable Court to

file an *Amicus Curiae* Brief in his Motion and accompanying Brief, argues that the basic structure of the Juvenile Court law in that State resembles that of Maryland (the use of referees in Juvenile cases with the final determination made before the juvenile court judge either on the record or by a hearing *de novo*). For this reason he claims that he should be permitted to file an *amicus curiae* brief in support of the Appellees.

2. By his motion and accompanying brief, the Public Defender seeks to inject into this case constitutional issues of due process and equal protection of the law. However, as evidenced by the briefs filed by the Appellants and Appellees, the sole broad issue raised on appeal is whether the statutory and rule procedures governing the Maryland juvenile court system violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Likewise, the District Court decided the case solely on this basis without resort to constitutional considerations of due process or equal protection of law.

3. To grant the motion and permit the filing of the *amicus curiae* brief would be tantamount to the presentation of new issues which were not considered by the District Court and which formed no basis for its opinion.*

It is for these reasons that the Appellants seasonably file this answer setting forth reasons for withholding consent to the filing of the *amicus curiae* brief by the Public Defender for the State of California.

* It should be noted that the Appellants consented to the filing of an *amicus curiae* brief by counsel representing the National Juvenile Law Center because Appellants believed that their brief was confined to issues raised and decided by the District Court.

WHEREFORE, the Appellants pray that this Honorable Court deny the Motion filed by the Public Defender for the State of California for leave to file an *amicus curiae* brief in support of Appellees.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.

Certification

I Francis B. Burch, Attorney General of Maryland and counsel for the Appellants do hereby certify that I served by United States Mail, postage prepaid first class on this Ninth day of March 1978, three copies of the Answer in Opposition to the Motion for Leave to File *Amicus Curiae* Brief on Paul Halvonik, State Public Defender of California, 45 Capitol Mall, Suite 360, Sacramento, California 95814, attorney for *Amicus Curiae,* David Howard, National Juvenile Law Center, 3701 Lindell Blvd, St. Louis, Missouri, 63108, *Amicus Curiae* for the National Juvenile Law Center and Peter Smith, Esquire, counsel for the Appellees Maryland Juvenile Law Clinic, 500 W. Baltimore Street, Baltimore, Maryland 21201.

I further certify that all parties required to be served in this appeal have been served.

FRANCIS B. BURCH,
Attorney General of
Maryland.